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EDITOR'S NOTE

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No. 86-1512-CFX
Status: GRANTED

Docketed:
March 18, 1987

See also:
85-516

Title: Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, Petitioner
v.
Myrna Underwood, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Burdick,Mary S.

Entry	Date	Note	Proceedings and Orders
1	Feb 6 1987		Application for extension of time to file petition and order granting same until March 18, 1987 (O'Connor, February 11, 1987).
2	Mar 18 1987	G	Petition for writ of certiorari filed.
3	Apr 20 1987		Brief of respondent Myrna Underwood in opposition filed.
5	Apr 29 1987	X	Reply brief of petitioner Pierce, Sec. of HUD filed.
6	May 18 1987		Petition GRANTED. **********
8	Jul 3 1987		Order extending time to file brief of petitioner on the merits until August 1, 1987.
9	Aug 5 1987		Order further extending time to file brief of petitioner on the merits until August 5, 1987.
10	Aug 5 1987		Brief of petitioner Pierce, Sec. of HUD filed.
12	Aug 24 1987		Order extending time to file brief of respondent on the merits until October 7, 1987.
13	Oct 5 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	Oct 6 1987		Brief amici curiae of Battles Farm Co., et al. filed.
14	Oct 7 1987		Brief amici curiae of Vernice Dubose, et al. filed.
15	Oct 7 1987		Brief amici curiae of Small Business Foundation of America, et al. filed.
16	Oct 7 1987		Brief amicus curiae of Natl. Organization of Social Security Claimants Repr. filed.
18	Oct 7 1987		Brief amici curiae of San Francisco Lawyers' Comm. for Urban Affairs, et al. filed.
20	Oct 9 1987		SET FOR ARGUMENT. Tuesday, December 1, 1987. (3rd case).
19	Oct 13 1987		Brief of respondents Myrna Underwood, et al. filed.
21	Oct 19 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
4	Oct 22 1987		DISTRIBUTED. **********
22	Oct 22 1987		Record filed.
23	Oct 30 1987		CIRCULATED.
24	Nov 24 1987	X	Reply brief of petitioner Pierce, Sec. of HUD filed.
25	Dec 1 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1512

No.

Supreme Court, U.S.
FILED
MAR 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government was "substantially justified," within the meaning of the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. III) 2412(d), in litigating a question on which this Court, at the government's request, eventually granted certiorari and issued a stay.

2. Whether the courts below properly identified the "special factors" that justify a departure from EAJA's usual $75-per-hour cap on attorneys' fees.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 3a-13a) is reported at 761 F.2d 1342. A subsequent amendment to the opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 802 F.2d 1107. The opinion of the district court concerning the liability of the United States for attorneys' fees (App., *infra*, 22a-36a) is reported at 547 F. Supp. 256. The opinion of the district court regarding the amount of the fee award (App., *infra*, 14a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. A timely petition for rehearing was denied on November 18, 1986 (App., *infra*, 37a-38a). On Febru-

ary 11, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. (Supp. III) 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * * * *
>
> (2) For the purposes of this subsection—
>
> (A) "fees and other expenses" includes * * * reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)[.]

STATEMENT

1. Congress enacted the Equal Access to Justice Act of 1980 (EAJA or Act), 28 U.S.C. (Supp. III) 2412(d), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in

specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. The Act does not mandate automatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. (Supp. III) 2412(d)(2)(B)) that prevails in a nontort civil action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. (Supp. III) 2412(d)(1)(A).

EAJA also differs from many fee-shifting statutes in that it contains a specific statutory cap on permissible fee awards. The Act provides that fees generally are to be computed on the basis of "prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. (Supp. III) 2412(d)(2)(A). But the statute conditions this general rule by directing that fees "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee" (*ibid.*).

2. This attorneys' fee dispute arose out of respondents' challenge to a decision by the Secretary of Housing and Urban Development (HUD) not to implement an "operating subsidy" program for low-income tenants. That program and the associated litigation are described in the Secretary's response and supplemental brief in response to the petition for certiorari in *Dubose* v. *Pierce*, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516. The Secretary's decision not to implement the "operating subsidy" program spawned a series of lawsuits, including the *Dubose* litigation, which was brought in the District of Connecticut, and the instant lawsuit, which was originally brought in the United States District Court for

the District of Columbia and subsequently transferred to the Central District of California. See *Underwood* v. *Hills,* No. 76-469 (D.D.C. Apr. 5, 1979).

Although the instant case was resolved adversely to the Secretary in district court (414 F. Supp. 526 (D.D.C. 1976)), this Court granted the Secretary's application for a stay of the district court's judgment (429 U.S. 892 (1976)). This Court subsequently granted the Secretary's petitions for writs of certiorari in two other operating subsidy cases. *Harris* v. *Ross,* 431 U.S. 928 (1977); *Harris* v. *Abrams,* 431 U.S. 928 (1977). Before the Court could resolve the merits of the operating subsidy dispute, however, the plaintiffs in the various cases and a new Secretary of HUD reached a comprehensive settlement. See generally *Battles Farm Co.* v. *Pierce,* 806 F.2d 1098, 1100 (D.C. Cir. 1986). This Court thereupon granted the Secretary's motion to refer the two cases on which certiorari had been granted back to the respective district courts for reconsideration in light of the settlement (439 U.S. 1001 (1978)).

Several years later, while the settlement was still being administered, plaintiffs' counsel in a number of the operating subsidy cases, including this one, moved for attorneys' fees and expenses under EAJA, which had been enacted in 1980. On May 25, 1982, the district court held that the plaintiffs in this case were entitled to a fee award, determining that the government's position in the operating subsidy dispute had not been not "substantially justified" within the meaning of the Act (App., *infra,* 22a-36a). The court noted that when the action here was filed, nine district courts "had already made preliminary or final rulings" adverse to HUD in operating subsidy cases (*id.* at 31a). This background, in the court's view, "clearly raise[d] the possibility that the Government was

unreasonable in pursuing the litigation" (*id.* at 32a (original quotation marks omitted)). The district court declined to attach any weight to this Court's grant of the government's petitions for writs of certiorari in the two related cases, explaining that the Court might have "decided to take up the case[s] to resolve the issues against HUD once and for all" (*id.* at 33a). And noting that HUD eventually settled the operating subsidy cases on the terms sought by the plaintiffs, the district court reasoned that "[s]uch a settlement probably would not have materialized had HUD been confident that the Court would uphold its position" (*ibid.*).

Some ten months later, the district court set the fee award (App., *infra,* 14a-21a), concluding that several factors justified a departure from the usual EAJA $75-per-hour cap. While the court did not in terms find that a fee in excess of $75 per hour was necessary to attract qualified attorneys, it did state that "[f]ew attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case" (*id.* at 15a). Relying on *Kerr* v. *Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976), the court then held that there also were "[o]ther special factors" here that "justif[ied] a fee award in excess of $75 per hour" (App., *infra,* 15a). These included the "novelty and difficulty of the issues" (*id.* at 16a), the "contingent nature of the fee and the undesirability of the case" (*id.* at 17a), the "high[] calibre" of the work performed by respondents' counsel (*ibid.*), and "prevailing market rates" (*ibid.*). The court therefore found it appropriate to award fees at rates ranging from $80 and $85 per hour for work performed in 1976 to $120 per hour for work performed in 1982. Using those rates, the court calculated a lodestar of $322,700 (*id.* at 20a).[1]

[1] After setting the lodestar, the district court multiplied the lodestar figure by 3.5 to compensate respondents' attorneys for "the contingent

3. The court of appeals affirmed the award of fees (App., *infra*, 3a-13a), finding for several reasons that the government's position in the operating subsidy litigation was not substantially justified. First, the court noted that a number of district courts had rejected the Secretary's position, "thus put[ting] [him] on clear notice that his position was without legal basis, but he continued to litigate the issue" (*id.* at 9a). The court also reasoned that the Secretary's decision to settle the litigation on terms that provided the plaintiffs with the requested relief "undermined" his contention that his legal position was supportable (*ibid.*). Conversely, the court of appeals refused to accord any weight to this Court's grant of certiorari in the two related operating subsidy cases, declining to "speculate as to the Court's intent in issuing those orders" (*ibid.*). And the court of appeals found no significance in this Court's stay of the district court's judgment in the instant case, concluding instead that the district court's decision "establishe[d] that the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating subsidy program (*ibid.*).

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nature of this case, its complexity, and, most importantly, the high quality of [counsel's] work, and the excellent results achieved." The court therefore entered a final fee award of $1,129,450. App., *infra*, 20a. This use of a multiplier was set aside by the court of appeals. In its initial opinion, the court of appeals held that reference to a multiplier is inappropriate under EAJA, for two reasons: because EAJA, unlike other fee-shifting statutes, "places a specific dollar limit on the hourly rate to be awarded" (*id.* at 13a), and because "[t]here is insufficient indication that Congress intended to expose the United States to compounds of the hourly rate" (*ibid.*). On rehearing, the court of appeals withdrew this aspect of its opinion, finding it unnecessary to decide "whether the use of a multiplier is permissible under the statutory language of the EAJA" (*id.* at 2a). Instead, the court concluded that "compensation for the special factors involved in this case was adequately provided for by the allowance of the hourly rates in excess of the $75.00 specified in the statute" (*ibid.*).

While the court of appeals found the use of a multiplier inappropriate (see note 1, *supra*), it also agreed with the district court that fees should be awarded here at rates exceeding $75 per hour. The court of appeals recited the trial judge's statement that few attorneys possess the requisite skill to handle cases like this one. App., *infra*, 11a. And referring to the district court's use of the multi-factor analysis set forth in *Kerr* v. *Screen Extras Guild, Inc.*, *supra*, the court of appeals held that "consideration of [the] *Kerr* factors is appropriate in determining the amount of fees to be awarded under the EAJA" (App., *infra*, 11a). The court therefore explained (*id.* at 11a-12a):

> The district court found that an hourly rate in excess of $75 was justified by several special factors, including the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases. The district court did not abuse its discretion in concluding that the hourly rates requested by [respondents' counsel]—ranging from $80 per hour for work in 1976 to $120 per hour for work in 1982—were appropriate and reasonable under the EAJA.

The court of appeals therefore affirmed a fee award of $322,700 (*id.* at 13a).

REASONS FOR GRANTING THE PETITION

The court of appeals resolved two issues in deciding this case. As a threshold matter, it concluded that the government's position in the operating subsidy litigation was not "substantially justified." Having thus held that respondents' counsel are entitled to fees under EAJA, the court of appeals proceeded to identify several factors—the

paucity of qualified attorneys, the supposed difficulty and novelty of the legal issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the results obtained, and customary fees in similar lawsuits—that, in its view, justified a departure from EAJA's $75-per-hour fee cap. Neither of these holdings can be reconciled with the analysis used by other courts of appeals in their EAJA rulings. The second prong of the decision below, moreover, is inconsistent with the decisions of this Court establishing general principles for setting attorneys' fees. Given the enormous volume of EAJA litigation, the errors committed by the court of appeals are of considerable practical significance and warrant review by this Court, which has yet to consider a case involving the construction of EAJA.

1. In *Dubose* v. *Pierce*, 761 F.2d 913 (1985), petition for cert. pending, No. 85-516, the Second Circuit held that the government's position in the operating subsidy litigation *was* substantially justified. That decision, obviously, is in square conflict with the Ninth Circuit's holding below that the government's position in the litigation *was not* substantially justified. As we noted in our supplemental brief (at 5-6) in *Dubose*, this disagreement between the Second and Ninth Circuits reflects, not only divergent views about the nature of the government's obligations under a now-defunct statute, but also a difference of opinion about the significance to the EAJA reasonableness determination of other, more generally applicable factors.

For example, the Ninth Circuit below accorded some weight to the fact that the Secretary eventually chose to settle the operating subsidy litigation, a consideration that the Second Circuit found to have little relevance. Compare App., *infra*, 9a with 85-516 Pet. App. 17. Conversely, the Ninth Circuit below refused to attribute any significance to this Court's stay of the district court's judgment or to this Court's grant of certiorari in other operating subsidy

cases, while the Second Circuit viewed those actions "as indicative of the * * * view that the government's position was not unreasonable." Compare App., *infra*, 9a with 85-516 Pet. App. 16. This conflict in reasoning illustrates the lower courts' general inability to develop clear guidelines to govern the resolution of EAJA disputes—a conflict sharply exemplified here, where two courts of appeals have reached contrary conclusions on essentially identical facts.

We believe that EAJA litigation would be greatly simplified by the formulation of clear rules or presumptions that test the reasonableness of the government's position by reference to objective indicia. Although the relevent criteria obviously will vary from case to case, this litigation provides an example of such an indicium. This Court's decision to stay the district court's judgment below (429 U.S. 892 (1976)) should have been viewed as virtually conclusive evidence that the government's position here was "substantially justified." As Justice Brennan has observed (*Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)), this Court's grant of a stay generally presupposes that the applicant has "established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari" and that the applicant has "persuade[d] [the Court] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 690, 693-696 (6th ed. 1986). Where a Circuit Justice or, as here (see 429 U.S. 892 (1976)), the full Court has taken the extraordinary step of granting a stay at the government's request, that action should give rise to at least a rebuttable presumption that the government's position was "substantially justified."

The grant of a stay by this Court, of course, is not a factor that is likely to arise in run-of-the-mill EAJA litigation. But the lower courts should be encouraged to search for other objective indicia of reasonableness (or unreasonableness) of the government's position, lest EAJA fee disputes invariably become time-consuming and expensive reruns of the litigation on the merits. Cf. *Hensley* v. *Eckerhart*, 461 U.S. 424, 455 (1983) (opinion of Brennan, J.). The conflict represented by *Dubose* and the instant case provides a concrete factual context in which this Court may furnish the lower courts with guidance about how the "substantially justified" inquiry of EAJA should be conducted.[2]

2. a. The second issue in this case, which concerns the circumstances in which a departure from the EAJA $75-per-hour limit is permissible, is independently worthy of this Court's attention. The statute provides that "attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. (Supp. III) 2412(d)(2)(A)(ii). Congress did not expressly identify, either in the Act itself or in the legislative history, the universe of "special factors" that might justify fee awards in excess of the statutory limit. See H.R. Rep. 96-1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. 96-253, 96th Cong., 1st Sess. 16 (1979); H.R. Rep. 96-1005, 96th Cong., 2d Sess. Pt. 1, at 11 (1980); 125 Cong. Rec. 21444 (1979) (statement of Sen. Kennedy). See generally *Aston* v. *Secretary of HHS*, 808 F.2d 9, 11 & n.1 [redacted] (2d Cir. 1986). But Congress cer-

[2] We note, however, that this case, like *Dubose* was decided under the version of EAJA that was enacted in 1981 and expired by its terms in 1984. See 85-516 Supp. Br. 8-9.

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tainly understood that $75 per hour—the figure chosen as the statutory standard—is lower than the usual rate charged by many attorneys, and that awarding fees at the $75 rate "would prevent a party from engaging * * * an expensive law firm and being able entirely to cover all the expenses that might be charged." *Award of Attorneys' Fees Against the Federal Government: Hearings on S.265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980) (statement of Rep. Kastenmeier). Indeed, the congressional mandate that fees exceed $75 per hour only when "special" circumstances are present indicates that it is only in rare cases that higher fees are justified. Cf. 28 U.S.C. (Supp. III) 2412(d)(1)(A) (barring an award of attorneys' fees, even if the government's position is not "substantially justified," where "special circumstances make an award unjust").

In light of this congressional intent, the courts of appeals, with the exception of the court below, have recognized that "the $75 statutory rate is a ceiling and not a floor." *Chipman* v. *Secretary of HHS*, 781 F.2d 545, 547 (6th Cir. 1986). The courts accordingly have held that, in EAJA, Congress " 'expressed clearly its intention that prevailing market rates are relevant only up to $75 per hour,' " so that " 'customary rates above $75 per hour cannot support a claim in excess of the statutory maximum rate' " (*ibid.* (citation omitted)). To implement this congressional design, the Sixth and the District of Columbia Circuits both have held that $75 per hour must be substituted for the attorney's customary rate (when that customary rate exceeds $75 per hour) in computing the EAJA lodestar. See *ibid.*; *Action on Smoking & Health* v. *CAB (ASH)*, 724 F.2d 211, 219-220, 222, 223 (D.C. Cir. 1984). Cf. *Vibra-Tech Engineers, Inc.* v. *United States*,

787 F.2d 1416, 1420 (10th Cir. 1986). And while the courts have suggested that an increase to the lodestar for exceptional representation may be permissible in extraordinary EAJA cases, both the District of Columbia and the Tenth Circuits have emphasized that "[a] court • • • is not to take into account the level of skill normally expected of a lawyer charging $75 per hour, but rather the level of skill expected of a lawyer commanding *this* lawyer's usual reasonabl[e] hourly fee." *ASH*, 724 F.2d at 219 (emphasis in original). Accord, *Vibra-Tech Engineers*, 787 F.2d at 1420.

Similarly, the District of Columbia and the Tenth Circuits have noted the congressional emphasis on the $75-per-hour figure in holding that the single "special factor" actually listed in the Act—the "limited availability of qualified attorneys for the proceedings involved"—may justify an increased fee award only in the "unusual situation where appropriately specialized legal services cannot be obtained in the market for $75 [an hour] or less." *Vibra-Tech Engineers*, 787 F.2d at 1420. Accord, *ASH*, 724 F.2d at 217. A determination that such a situation exists requires suitably detailed factual findings about the actual availability of qualified attorneys, not generalized statements about the supposed difficulty of the case. See generally *Aston*, 808 F.2d at 11; *Chipman*, 781 F.2d at 547. Cf. *Pennsylvania* v. *Delaware Valley Citizens' Council*, No. 85-5 (July 2, 1986), slip op. 20. Thus, as the District of Columbia Circuit held in *ASH*, a fee award in excees of $75 per hour is not appropriate where the attorney's particular expertise, while useful in conducting the suit, was not "necessarily require[d]" for the prosecution of the litigation. 724 F.2d at 218.[3]

[3] Although the courts have not yet focused on this consideration, the unusual nature of EAJA's "substantially justified" standard suggests that the plaintiff's risk of losing the suit (and thus of not receiving a fee award) is not a consideration that justifies a fee increase, whatever the relevance of that factor under other fee-shifting statutes. (*Pennsylvania* v. *Delaware Valley Citizens' Council*, No. 85-5, currently pending, presents the question whether contingency *ever* justifies an increase in fee awards, even outside the EAJA context.) Fees may be awarded under EAJA only when the government's position is unreasonable; in such a case, the plaintiff's risk of loss can hardly have been high. Cf. *Hirschey* v. *FERC*, 777 F.2d 1, 4-5 (D.C. Cir. 1985). This case itself illustrates the anomalies that follow from use of contingency as a factor to increase EAJA fees. In finding that the government's position was not substantially justified, the court of appeals concluded that "the Secretary had no reasonable basis in law" for failing to implement the operating subsidy program (App., *infra*, 9a), and that the government's lack of success in various district courts put the Secretary "on clear notice that his position was without legal basis" (*ibid.*). While we disagree with these characterizations of the Secretary's position, they obviously were essential to the court of appeals' holding that the government was liable for fees. And if it was clear from the outset that the Secretary's position was without merit, respondents' attorneys did not risk much in undertaking the representation here.

b. The decision below cannot be squared with these holdings of the other courts of appeals. In choosing to exceed the $75-per-hour cap, the court below listed as "special factors" not only the supposed paucity of attorneys possessing the necessary litigation skills (App., *infra*, 11a), but also "the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases" (*id.* at 12a). By this analysis, the court evidently meant to label as EAJA "special factors" all of the considerations listed in *Kerr*, a previous Ninth Circuit decision that, in turn, had simply adopted (526 F.2d at 69-70) the 12 factors for calculating an attorneys' fee that are set out in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See generally *Delaware Valley Citizens' Council*, slip op. 14-15 & n.7.

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This reasoning cannot be reconciled with the approach of the other appellate decisions that we have discussed. While baldly asserting that few attorneys possessed the skills necessary to handle this case successfully (see App., *infra*, 11a, 15a), neither court below made a specific finding that "appropriately specialized legal services" could not "be obtained in the market for $75 [per hour] or less" (*Vibra-Tech Engineers*, 787 F.2d at 1420). On the record here, moreover, such a finding plainly could not have been made.[4] And the consideration by the courts below of the

[4] It is obvious that special skill was not needed to conduct the litigation here. This case was one of 17 operating subsidy suits brought against the Secretary across the country; plaintiffs were successful in all 17 (see App., *infra*, 23a n.1). Thus, the district court in *Dubose*, while finding a fee award appropriate, declined to award a fee in excess of $75 per hour, stating that the operating subsidy litigation "presented a relatively simple question" and that "[b]ecause an unusually high degree of legal talent was not required in this case, there was no dearth of lawyers who could have achieved similar results." *Dubose* v. *Pierce*, 579 F. Supp. 937, 953 (D. Conn. 1984), rev'd on other grounds, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516. Indeed, plaintiffs had prevailed against the Secretary at least preliminarily in nine operating subsidy suits at the time that the instant action was brought (see App., *infra*, 33a n.11), and this suit was resolved in district court in less than three months, without trial and with minimal discovery, on the basis of arguments that already had been briefed elsewhere. The district court here also pointed (App., *infra*, 15a) to the settlement activities of respondents' counsel in concluding that there were few attorneys who could have handled this case. But the administration of even a complex settlement does not call for specialized counsel. And the suggestion that a high fee was necessary to attract qualified counsel is belied by the record here, since respondents' counsel undertook the representation several years before EAJA was enacted, at which time they could have had *no* expectation of a fee. See App., *infra*, 7a, 35a. Indeed, respondents' counsel expressly disavowed any intent to obtain a fee from the settlement fund. See *ibid.*

expertise of respondents' counsel and of customary rates in similar cases (App., *infra*, 6a, 11a-12a, 17a) flatly conflicts with *Chipman* and *ASH*. Those decisions held that " 'prevailing market rates are relevant only up to $75 per hour' " (*Chipman*, 781 F.2d at 547) and that the $75 figure must be substituted for the customary or prevailing rate in calculating the lodestar.

More fundamentally, the court of appeals' approach would render EAJA's $75-per-hour cap nugatory. The 12 factors set out in *Kerr* and *Johnson* are considerations that have been taken into account by the courts in computing a reasonable fee, under statutes that do not contain statutory caps, as an alternative to the lodestar approach. See *Kerr*, 526 F.2d at 70; see generally *Delaware Valley Citizens' Council*, slip op. 14. As this Court has explained, many of these factors—including, among those considered by the court below, the novelty and complexity of the issue, the skill and experience of counsel, the quality of representation, and the results obtained—"are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award" in any but the most extraordinary case (*id.* at 17).

This principle is fully applicable here. When computing fees under EAJA, factors such as the quality of representation, the complexity of the case, and the experience of counsel must be deemed subsumed within a lodestar calculated on the basis of the $75 rate specified by the statute. See *Chipman*, 781 F.2d at 547.[5] As a result, a

[5] The court of appeals in *ASH* indicated that the EAJA lodestar could be modified to reflect contingency, quality of representation, and exceptional results—factors that it previously had held could be used to modify the lodestar under other fee-shifting statutes. 724 F.2d at 218-219 (citing *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc)). The *ASH* decision, however, predated this Court's holdings in *Delaware Valley Citizens' Council* and *Blum* v. *Stenson*, 465 U.S. 886 (1984), which indicated that those factors generally are subsumed within the lodestar. When *ASH* is viewed in light of those

highly experienced (or simply high-priced) attorney may not receive his usual fee under EAJA. But that is a necessary consequence of EAJA's "explicit statutory fee cap." *ASH*, 724 F.2d at 217 (footnote omitted). If, instead, each of the *Kerr* and *Johnson* considerations—which are, after all, used in calculating fees ab initio under other fee-shifting statutes—is treated as a "special factor" justifying a departure from the $75-per-hour limit, attorneys compensated under EAJA will *always* receive more than $75 per hour, so long as they would have received more than $75 per hour had they been compensated under another statute. Indeed, if such an approach is taken, fees will be calculated under EAJA in a manner *identical* to their computation under fee-shifting statutes that do not have an express statutory cap. Congress plainly had no such result in mind when it explicitly limited EAJA attorneys' fees to a maximum rate of $75 per hour.

c. The court of appeals' decision effectively reads the fee cap out of EAJA. That result is of considerable practical significance, since the issue here may arise with great frequency. According to figures compiled by the Administrative Office of United States Courts, the federal courts granted 555 EAJA fee applications in 1986 alone. And the decision below is not a sport. The Ninth Circuit previously has cited the *Kerr* multiple-factor analysis in approving EAJA fee awards exceeding $75 per hour. *International Woodworkers* v. *Donovan*, 769 F.2d 1388, 1391 (9th Cir. 1985). See also *LaDuke* v. *Nelson*, 762 F. 2d 1318, 1333 (1985), modified, 796 F.2d 309, 310 (9th Cir. 1986). And

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decisions by this Court, it plainly is inconsistent with the holding below. While the holding below also predated *Delaware Valley Citizens' Council*, the court of appeals, in modifying its opinion in the wake of that decision, did not alter its holding that all the *Kerr* considerations are "special factors" for purposes of EAJA. See App., *infra*, 1a-2a.

this approach has been followed by district courts both inside and outside the Ninth Circuit. See *Miller* v. *Hotel & Restaurant Employees*, 107 F.R.D. 231, 242 (N.D. Cal. 1985); *Bunn* v. *Bowen*, 637 F. Supp. 464, 476 (E.D.N.C. 1986); *Hyatt* v. *Heckler*, 618 F. Supp. 227, 233 (W.D.N.C. 1985), vacated on other grounds, 757 F.2d 1455 (4th Cir. 1985). In these circumstances, review of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5773
D.C. No. CV 79-1318-HP

MYRNA UNDERWOOD, SHEILA FAZANDE, ANNIE JOHNSON, JEROME SMITH, CORA EWERS, FRANCES JARDIN, LURA R. STENTZ, CHARLOTTE WEST, ARITISHA MCGEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California

[FILED OCT. 15, 1986]

ORDER

Before: HUG and FLETCHER, Circuit Judges, and CARROLL*

The opinion appearing at 761 F.2d 1342 is amended as follows: Section VI, commencing on page 1347, is modified by retaining the first paragraph, eliminating the remainder of the section, and substituting the following:

> The Supreme Court recently has expressed caution as to the use of multipliers in calculating reasonable attorneys' fees. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 3096-

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* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

3100 (1986). We need not decide in this case whether the use of a multiplier is permissible under the statutory language of the EAJA or under the recent Supreme Court authority. We conclude that compensation for the special factors involved in this case was adequately provided for by the allowance of the hourly rates in excess of the $75.00 specified in the statute.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5773
D.C. No. CV 79-1318-HP

MYRNA UNDERWOOD, SHEILA FAZANDE, ANNIE JOHNSON, JEROME SMITH, CORA EWERS, FRANCES JARDIN, LURA R. STENTZ, CHARLOTTE WEST, ARITISHA MCGEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California

Honorable Harry Pregerson, Presiding
Argued and Submitted November 8, 1983 –
Los Angeles, CA

[FILED MAY 23, 1985]

OPINION

Before: HUG and FLETCHER, Circuit Judges, and CARROLL,* District Judge.

Per Curiam:

This case requires us to consider the calculation of awards of attorneys' fees under the Equal Access to Justice

* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

Act. The Secretary of Housing and Urban Development was ordered to pay $1,129,450 to the attorneys representing low income tenants in a class action against the Secretary. The fee award calculation included time for services performed in litigating the case and time spent by the attorneys in administering a settlement agreement.

We hold that the plaintiff class is entitled to a fee award for its attorneys' litigation and settlement administration services. We also hold that ordering payment of fees at a rate in excess of $75 per hour was not an abuse of discretion on these facts. Finally, we hold that Congress did not intend to authorize the use of a multiplier to compound awards granted under the Equal Access to Justice Act.

I

FACTS

This action was brought by tenants of government-subsidized housing to challenge the refusal of the Secretary of Housing and Urban Development to implement a subsidy program authorized by the National Housing Act, 12 U.S.C. § 1715*z*-1 (1982). The Act authorized the Secretary to make payments to owners of government-subsidized apartment houses to cover increased costs for utilities and local taxes. The purpose of the payments was to prevent the shifting of those costs to low income tenants through rent increases. As provided by 12 U.S.C. § 1715*z*-1(g), the Secretary had accumulated a rental reserve fund to finance the operating subsidies. However, he had refused to distribute that fund

Underwood brought this action in the District of Columbia as a class action on behalf of all persons nationwide who reside or had resided in apartments subsidized under 12 U.S.C. § 1715*z*-1. That district court granted a summary judgment for the class and entered a permanent in-

junction and writ of mandamus requiring the Secretary to disburse the operating subsidy fund. *See Underwood v. Hills*, 414 F. Supp. 526, 532 (D.D.C. 1976), *aff'd*, *Hills v. Underwood*, 429 U.S. 892 (1976).

The Supreme Court granted a stay of mandate. It also granted certiorari in two cases raising identical claims, *Ross* v. *Community Services, Inc.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom.*, *Harris* v. *Ross*, 431 U.S. 928 (1977), *remanded for consideration of settlement*, 439 U.S. 1001 (1978), and *Abrams* v. *Hill*, 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom.*, *Harris* v. *Abrams*, 431 U.S. 928 (1977), *remanded for consideration of settlement*, 439 U.S. 1001 (1978). Prior to hearing before the Court, the parties in *Ross*, *Abrams*, and the instant case entered into a settlement agreement. It was agreed that the Secretary would deposit $60 million with an escrow agent to create a settlement fund. The fund was to be distributed to owners of housing subsidized under the Act or directly to tenants in those projects where rents had been increased because no operating subsidy had been received. Price Waterhouse & Co. in Los Angeles contracted to distribute the fund, and Underwood's counsel was designated lead counsel for the settlement administration. Because these appointments focused the settlement activities in Los Angeles, the District of Columbia court transferred the case to the Central District of California.

After execution of the settlement agreement had begun under the district court's supervision, Congress enacted the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1982). Underwood sought an award under EAJA to compensate her attorneys for time spent in litigating the initial action and in supervising the distribution of the settlement fund. The district court concluded that Underwood was entitled to fees under EAJA as the prevailing party in an action brought against the United States. The court determined that Underwood's attorneys had pro-

vided 3,304 hours of service and applied an hourly rate ranging from $80 to $120, based on the prevailing market rates in the year the service was performed and the individual attorney's expertise. This resulted in a lodestar figure of $322,700, to which a multiplier of three-and-one-half was applied. The resulting award to Underwood was $1,129,450.

On appeal, the Secretary challenges both Underwood's entitlement to an award and the district court's calculation of the award. We are required to determine the following issues: (1) Did the settlement agreement preclude a fee award? (2) Was the Secretary's position substantially justified? (3) Do special circumstances make the award unjust? (4) Did the district court err in calculating the award? (5) Did Congress intend that a multiplier be applied to awards granted under EAJA?

II

EFFECT OF SETTLEMENT AGREEMENT

The Secretary claims that in entering into the settlement agreement, Underwood waived all claims for fees and is therefore barred from asserting a statutory claim. He relies on three provisions of the agreement:

> (1) Section 3, which governs distribution of the fund, provides in subsection (f): "None of the sums distributed may be used to pay attorney's fees";
>
> (2) Subsection 3(e) provides for the return to the Secretary of "any money which remains after all claims are paid"; and
>
> (3) Section 4 of the agreement, which governs the mechanics of distribution, assigns certain costs of administration to HUD in subsection (d). It concludes that "distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD."

The Secretary contends these three provisions, read together, demonstrate a clear intent to draw no attorneys' fees from the settlement fund. Because the fund was the only possible source of fees when the agreement was signed, he reads the agreement as Underwood's promise to relinquish all claims to fees.

The district court interpreted the agreement as precluding the payment of fees from the settlement fund. *Underwood* v. *Pierce*, 547 F. Supp. 256, 262 (C.D. Cal. 1982). It determined that Underwood's attorneys intended to waive such fees because "[w]hen the settlement was negotiated the common fund/common benefit doctrine provided the only realistic basis for a fee award, which plaintiffs' counsel agreed to forego since that could have reduced the amounts paid to low-income class members." *Id.* at 263. The court found, however, that the parties had no intent to preclude the possibility of a recovery of fees under EAJA. *Id.*

The district court's interpretation of the settlement agreement presents a question of law subject to *de novo* review. *In re U.S. Financial Securities Litigation*, 729 F.2d 628, 631-32 (9th Cir. 1984).

The first two settlement agreement terms on which the Secretary relies – sections 3(e) and 3(f) of the agreement – do not support his contention. Those sections merely indicate that no fees may be paid from the settlement fund itself. The two provisions are thus entirely consistent with the district court's findings that Underwood's attorneys had no intention of depleting the fund, but that the parties did not foreclose an award from sources outside the fund.

Nor does section 4(d) of the agreement in any way preclude an award of attorneys' fees. Attorneys' fees were dealt with exclusively in section 3(f) of the agreement. Reading the agreement as a whole, it is plain that section 4(d) was not intended to address the question of the availability of attorneys' fees at all, but was rather concerned

with miscellaneous "housekeeping" expenses. We therefore conclude that the Secretary has failed to establish that the parties intended to waive all attorneys' fees attendant to the administration of the settlement agreement.

We agree with the district court that the agreement does not foreclose recovery under EAJA for legal expenses for litigation and settlement administration.

III

SUBSTANTIAL JUSTIFICATION

Section 2412(d)(1)(A) requires the district court to award fees unless it finds the position of the United States was substantially justified. To evaluate the government's position, we consider the totality of the circumstances present prior to and during litigation. *Timms v. United States*, 742 F.2d 489, 492 (9th Cir. 1984); *Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984). The government must demonstrate that its position had a reasonable basis both in law and in fact. *Timms*, 742 F.2d at 492; *Wolverton v. Heckler*, 726 F.2d 580, 583 (9th Cir. 1984). We review, for an abuse of discretion, the district court's determination that the government's position was not substantially justified. *United States v. First National Bank of Circle*, 732 F.2d 1444, 1446 (9th Cir. 1984); *Rawlings*, 725 F.2d at 1196.

The district court found that the Secretary's position was not substantially justified because tenants of subsidized housing had brought numerous previous actions to require disbursement of the operating subsidy funds and in each the district court had held that payment of the subsidies was mandatory under 12 U.S.C. § 1715z-1. 547 F. Supp. at 257 & n.1. We agree that these prior adverse decisions are relevant to the substantial justification question. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250-51 (9th Cir. 1984); *Southern Oregon Citizens Against Toxic*

Sprays, Inc. v. Clark, 720 F.2d 1475, 1481 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 446 (1984); *Hoang Ha v. Schweiker*, 707 F.2d 1104, 1106 (9th Cir. 1983). We are not persuaded by the Secretary's contention that the earlier rulings were only "non-final district court decisions" that mandated no change in his policies. Numerous courts in different districts had agreed with the tenants' contentions. The Secretary was thus put on clear notice that his position was without legal basis, but he continued to litigate the issue.

The Secretary also suggests that the Supreme Court, by granting a stay in this case and certiorari in two related cases, virtually certified that his position was substantially justified. We are reluctant to speculate as to the Court's intent in issuing those orders. We observe, however, that they are susceptible to interpretations other than those advanced by the Secretary. First, if the cases are considered in historical perspective, the Court may have granted certiorari to consider the broad question of the executive's power to impound funds, rather than the narrow issue of the meaning of 12 U.S.C. § 1715z-1. Second, the Court may have acted in sympathy with the low-income tenants who were forced to bring numerous successive actions to enforce their rights under section 1715z-1. *See Underwood v. Pierce*, 547 F. Supp. at 262. We also note that the Secretary's insistence that the Court's orders justified his position is undermined by the fact that, following entry of those orders, he entered into a settlement granting the plaintiffs all the relief they had requested. *See Dubose*, 579 F. Supp. at 951.

More significantly, the decision of the District of Columbia court on the merits of this matter establishes that the Secretary had no reasonable basis in law to ignore the mandates of section 1715z-1. *See Underwood v. Hills*, 414 F. Supp. at 531; *see also Dubose*, 579 F. Supp. at 950 (Secretary's position in refusing to disburse operating subsidies "unreasonable" and "had no justifiable basis.")

We hold that the district court did not abuse its discretion in finding that the Secretary's position was not substantially justified.

IV

SPECIAL CIRCUMSTANCES

EAJA directs the district court to deny fees if "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). This provision allows the government to defeat a fee application even if its position is not substantially justified. *See Berman v. Schweiker,* 713 F.2d 1290, 1295 n.18 (7th Cir. 1983). The Secretary argues such special circumstances exist in this case because the parties did not contemplate a fee award when the settlement was negotiated. He contends that imposing an award after the fact constitutes an "extraordinary injustice."

The Secretary bases his argument on *Aho v. Clark,* 608 F.2d 365 (9th Cir. 1979). In *Aho,* the district court denied a request for an award of attorneys' fees under 42 U.S.C. § 1988 (1982). The fee request had been filed following the entry of a consent decree. In determining that the denial was not an abuse of discretion, we relied upon the fact that the consent agreement made no reference to attorneys' fees even though section 1988 had been enacted prior to the parties' approval of the agreement. *Id.* at 367. We also observed that the defendant had begun to take the action demanded by the suit prior to the time it was filed and had manifested no bad faith or obdurate conduct. *Id.* at 367-68.

The facts in this case do not compel a similar result. We have held that the parties did not intend to foreclose the recovery of fees under EAJA. The recovery therefore will not deprive the Secretary of the benefit of his bargain. The district court's determination that special circumstances did not require the denial of an award thus was not an abuse of discretion.

V

CALCULATION OF AWARD

Section 2412(d)(2)(A)(ii) establishes a cap on the hourly rate awardable under EAJA:

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. . . .

The district court concluded that a fee in excess of $75 per hour was warranted in this case because the litigation was complex and protracted and "[f]ew attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case." To determine the proper hourly amount, the court applied the factors approved by this court in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976). Based on those factors, it found that an appropriate hourly rate for attorney Patricia Tenoso ranged from $85 per hour in 1976 to $120 per hour in 1981 and that an appropriate hourly rate for attorney Mary Burdick ranged from $80 per hour in 1976 to $120 per hour in 1982. These findings were based on prevailing market rates for those years and on each attorney's experience.

We have recently indicated that the consideration of *Kerr* factors is appropriate in determining the amount of fees to be awarded under the EAJA. *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1251 (9th Cir. 1984). *See also Action on Smoking & Health v. Civil Aeronautics Board,* 724 F.2d 211, 218 (D.C. Cir. 1984) (factors such as the contingent nature of success, delay in payment, and quality of representation constitute "special factors" under the EAJA). The district court found that an hourly rate in excess of $75 was justified by several special factors, includ-

ing the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases. The district court did not abuse its discretion in concluding that the hourly rates requested by Western Center – ranging from $80 per hour for work in 1976 to $120 per hour for work in 1982 – were appropriate and reasonable under the EAJA.

The Secretary's claim that Underwood is not entitled to fees for services performed prior to October 1, 1981 is without merit. *See Timms v. United States*, 742 F.2d at 493.

VI

USE OF MULTIPLIER

The district court calculated the fee award by multiplying the hours compensable for each year by that year's hourly rate. It then added the totals for each attorney for each year to derive a lodestar, to which the court finally applied a multiplier. It concluded that "a multiplier of 3.5 properly reflects the contingent nature of this case, its complexity, and, most importantly, the high quality of Western Center's work, and the excellent results achieved."

Section 2412(d) contains no express authorization for the use of a multiplier. Underwood contends that Congress approved the use of a multiplier by its use of the term "special factor" in section 2412(d)(2)(A)(ii). She explains that that term has been used to justify the use of a multiplier for awards made under statutes other than EAJA, including the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982); Title VII, 42 U.S.C. §§ 2000e *et seq.* (1982); the Rehabilitation Act, 29 U.S.C. § 794 (1982); and the Clayton Act, 15 U.S.C. § 15 (1982).

We do not find Underwood's argument persuasive. Two important distinctions set EAJA apart from all the statutes which Underwood analogizes. The first is that EAJA alone places a specific dollar limit on the hourly rate to be awarded. Because the statutory limit is so precise, we refuse to inflate it by 350% without a stronger indication that Congress intended for us to do so.

Second, unlike the statutes that Underwood uses to illustrate her point, EAJA authorizes an award of fees against the United States. We must consider carefully the scope of the government's waiver of its sovereign immunity. We cannot order an award that has not been "specifically and unequivocally authorized by Congress." *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1132 (9th Cir. 1974). There is insufficient indication that Congress intended to expose the United States to compounds of the hourly rate. We therefore hold that a multiplier may not be applied to fees awarded under EAJA.

VII

CONCLUSION

Underwood is entitled to a reasonable attorneys' fee for litigation and settlement administration services performed in this case. Underwood's attorneys are entitled to be compensated at the hourly rate specified by the district court but are not entitled to have a multiplier factor applied to that fee. The appellees are therefore entitled to an attorneys' fee in the amount of $322,700. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 79-1318-HP

MYRNA UNDERWOOD, ET AL., PLAINTIFFS,

v.

SAMUEL R. PIERCE, ET AL., DEFENDANTS.

[FILED FEB. 3, 1983]

MEMORANDUM AND ORDER GRANTING WESTERN CENTER ON LAW AND POVERTY'S MOTION FOR AN AWARD OF INTERIM ATTORNEYS' FEES

BACKGROUND

On March 25, 1982, this court determined that under the Equal Access to Justice Act of 1980 (EAJA), 28 U.S.C. § 2412,[1] Western Center on Law and Poverty (Western Center) was entitled to an award of attorneys' fees.[2] In a motion filed on July 13, 1982, and heard on

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[1] The EAJA provides that

> a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412.

[2] *Myrna Underwood, et al. v. Samuel R. Pierce, et al.*, United States District Court, Central District of California, Case No. 79-1318-HP, Memorandum and Order filed March 25, 1982 Granting Western Center on Law and Poverty's Motion for Determination of Entitlement to an Award of Attorney's Fees.

October 14, 1982, Western Center asked for an interim fee award from the Department of Housing and Urban Development (HUD) of $1,762,560 for 3,672 hours of work.

For a number of reasons, including the need to search for class members who have failed to cash settlement checks totaling about $900,000, this litigation will not be concluded for at least another ten months. To delay a fee award until the entire case is closed would work substantial hardship on Western Center; therefore, an interim fee award is appropriate.[3] *See Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 723 (1974).

DETERMINATION OF HOURLY RATE

The EAJA limits the award of attorneys' fees to $75 per hour "unless the court determines that an increase in the cost of living or a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). This litigation was complex and protracted. Few attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case. Thus, a fee in excess of $75 per hour is justified.

Other special factors justify a fee award in excess of $75 per hour. In *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), the Ninth Circuit enumerated the factors relevant to a determination of reasonable attorneys' fees:

> (1) the time and labor required, (2) the novelty and difficulty of the question involved, (3) the skill requisite to perform the legal service properly, (4) the pre-

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[3] The EAJA does not preclude an interim award of attorney's fees. "A fee award may . . . be appropriate where . . . [a] party has prevailed on an interim order which was central to the case. . . ." H.R. Rep. No. 96-418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4990.

> clusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Id. at 70.

This court has considered all the *Kerr* factors but will discuss only those necessary to determine a reasonable fee award. *See Rivera v. City of Riverside*, 679 F.2d 795, 796-97 (9th Cir. 1982).[4]

NOVELTY AND DIFFICULTY OF THE ISSUES

This case involved the largest class action settlement fund—$60 million—ever administered by legal aid counsel. After a nationwide search, about $45 million was distributed to more than 145,000 eligible poor persons. The overall plan of administration required counsel to develop a unique formula for distribution of funds, to create effective and fair claims processing procedures, to institute complex fraud control systems, to launch an extensive media campaign to local class members, and to carry out other programs, all tailored especially for this case.

[4] The parties' affidavits and briefs provided sufficient information on which to base the award. *See Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838 (9th Cir. 1982).

CONTINGENT NATURE OF THE FEE AND THE UNDESIRABILITY OF THE CASE

When this case was filed, a fee award from funds that class members might receive was speculative and contingent. HUD's liability for attorneys' fees was precluded by sovereign immunity until the passage of the EAJA in 1980. Considering these factors and the length of time and amount of work necessary to complete the case, it is reasonable to conclude that most lawyers would view this case as undesirable.

THE WORK AND ABILITY OF COUNSEL, THE AMOUNT INVOLVED, AND THE RESULTS OBTAINED

Western Center exhibited tireless dedication and devotion in managing this protracted litigation and in administering its complex settlement agreement. Its work was of the highest calibre.

CUSTOMARY FEES AND AWARDS IN OTHER CASES

The hourly rates requested by Western Center are reasonable. The fees range from $80 per hour for work in 1976 to $120 per hour for work in 1982. Western Center based its hourly rates on counsel's experience and expertise and on prevailing market rates. The hourly fees requested are comparable to others granted in this district. *See Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982) (fee award was computed at $125 per hour); *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980) (fees awarded ranged from $88/hour in 1976 to $117.50/hour in 1979).

CALCULATION OF FEE AWARD

Appropriate hourly rates may only be applied to time counsel reasonably spent in connection with this case. *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982). While

"[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney," *Lindy Bros. Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973), the application for a fee award must have sufficient detail for a cou[illegible]o make a fair and reasonable determination whether the hours claimed are justified. *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

Western Center has adequately set forth the hours its attorneys spent in litigating this case and in administering the settlement agreement.[5] Western Center provided time records describing the work performed and the time expended. These records provide sufficient detail to reasonably determine the work counsel performed during any given period. Furthermore, this court observed, first-hand, the results of Western Center's work in this case. The quality of that work is additional evidence that the time Western Center states it devoted to this case was reasonable. In fact, Western Center represents that counsel exercised considerable restraint in computing the hours worked, frequently underestimating the time spent.

While the requested hourly rates apply to all work of Western Center in both the litigation and settlement aspects of the case, some hours listed in the time records reflect time spent lobbying Congress. Hours that are not directly related to this case should not be included in the number of hours for which Western Center is entitled to compensation. It does not appear, however, that Western Center spent a significant amount of time on such extraneous activities. Moreover, time records for Ms. Tenoso's work for two years required reconstruction, but Western

[5] The court notes that the work performed by Western Center's attorneys in administering the settlement agreement was primarily work that required lawyering skills.

Center indicated that for those years the estimated hours were far below the number actually worked. Because Western Center's records are somewhat imprecise and because it is necessary to adjust for time spent in lobbying activities and for other work not directly related to the instant case, the court will reduce the number of hours submitted by Western Center by ten percent.

To determine the total attorneys' fee award the Ninth Circuit has approved blending the *Kerr* guidelines with the "lodestar" analysis. *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 840 (9th Cir. 1982). The "lodestar" analysis "involves the calculation of a 'lodestar' figure based on multiplying the number of hours spent by counsel times the prevailing billing rate for comparable legal services in the community." *Id.* The blending of the *Kerr* guidelines and the "lodestar" analysis is exemplified in *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980). Under the blended approach

> the court fixes a reasonable hourly rate for the attorneys' time and multiplies the hourly rate for each attorney by the number of hours worked. After this "lodestar" sum is reached, the court then considers the contingent nature of the action and the quality of the attorneys' efforts to determine whether an increase or decrease of the lodestar is mandated. If the court determines that the lodestar sum should be increased because of the contingent nature of the action and the quality of the attorneys' work, then the court determines what an appropriate "multiplier" should be. When historical hourly rates are used, another appropriate factor to consider in arriving at the proper "multiplier" is the effect of inflation and other hardships caused by a delay in receiving compensation for services.

Id. at 412-13.

This court finds the following rates and hours to be fair and reasonable:

TENOSO

YEAR	HOURLY RATE	HOURS	TOTAL
1976	$85	367	$31,195.00
1977	$90	37	$3,330.00
1978	$95	295	$28,025.00
1979	$100	815	$81,500.00
1980	$110	279	$30,690.00
1981	$120	95	$11,400.00
BURDICK			
1976	$80	367	$29,360.00
1977	$85	37	$3,145.00
1978	$90	107	$9,630.00
1979	$95	418	$39,710.00
1980	$105	156	$16,380.00
1981	$115	277	$31,855.00
1982	$120	54	$6,480.00
TOTAL FOR SERVICES OF WESTERN CENTER		3,304	$322,700.00

This court rules that a multiplier of 3.5 properly reflects the contingent nature of this case, its complexity, and, most importantly, the high quality of Western Center's work, and the excellent results achieved. Therefore, the court awards Western Center fees of $1,129,450.00.

SOURCE OF FEES

Finally, Western Center requests that this court order HUD to pay the fee award out of its administrative budget. No statute requires the court to designate the fund from which the fee award is to be paid, and the court declines to make such a designation.

The clerk is ordered to serve a copy of this memorandum and order on all counsel of record.

Dated: 2/3/83.

/s/ HARRY PREGERSON

Harry Pregerson
United States Circuit Judge
sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT,
C. D. CALIFORNIA

No. 79-1318-HP.

MYRNA UNDERWOOD, ET AL., PLAINTIFFS,

v.

SAMUEL R. PIERCE, ET AL., DEFENDANTS.

March 25, 1982

MEMORANDUM AND ORDER GRANTING WESTERN CENTER ON LAW AND POVERTY'S MOTION FOR DETERMINATION OF ENTITLEMENT TO AN AWARD OF ATTORNEYS' FEES

PREGERSON, Circuit Judge, Sitting by Designation.

This court has been asked to determine whether Western Center on Law and Poverty, Inc. (Western Center) is entitled to attorneys' fees in this litigation for work performed in representing a class of low-income tenants who resided in certain federally subsidized housing projects.

Western Center, a public-interest law firm that acts as an advocate on behalf of low-income persons, contends that it is entitled to an award of fees under both the common fund/common benefit doctrine and the Equal Access to Justice Act of 1980, 28 U.S.C. § 2412. Counsel for defendant, Samuel R. Pierce, Secretary of Housing and Urban Development (HUD), denies the applicability of either ground for entitlement to fees.

The court concludes that the common fund/common benefit doctrine is inapplicable, that the Equal Access to Justice Act applies and that Western Center is entitled to an award of fees under that act.

BACKGROUND

In 1974 Congress passed section 236 of the Housing and Community Development Act. 12 U.S.C. § 1715z-1(f)(3) and (g). That legislation created a reserve fund to subsidize low-income tenants of certain federally assisted housing projects so that they would not bear the full burden of rising tax and utility costs. HUD, charged with implementing the tax and utility subsidy program, refused to do so. As a result, numerous lawsuits, including the instant *Underwood* litigation, were filed in district courts throughout the country.[1] Eventually, after extended litigation, HUD

[1] This court knows of at least seventeen cases filed to assert rights to the section 236 tax and subsidy program. *Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D.Md.), *subsequent opinion*, 405 F.Supp. 831 (D.Md.1975), *aff'd mem.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom. Harris v. Ross*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded to district court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978); *Abrams v. Hills*, 415 F.Supp. 550 (C.D. Cal.), *aff'd*, 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom. Harris v. Abrams*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243, *remanded to district court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978); *Underwood v. Hills*, 414 F.Supp. 526 (D.D.C.1976), *stay granted sub nom. Harris v. Underwood*, 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976), *applic'n to vacate stay denied*, 434 U.S. 993, 98 S.Ct. 626, 54 L.Ed.2d 488 (1977); *Harrison v. Hills*, (W.D.Pa. C.A. No. 75-938, Oct. 1, 1975); *Carberry v. Hills*, (D.Mass. C.A. No. 76-521-F, March 8, 1976); *Parker Square Tenants Association v. HUD*, (W.D.Mo. C.A. No. 75C577-W-3, Jan. 27, 1976); *Gertsch v. Hills*, 414 F.Supp. 15 (D.Utah 1976); *Folsom Gardens Action Comm. v. Hills*, (E.D.Cal. C.A. No. S-76-43-TJM, Feb. 12, 1976); *Campbell v. HUD*, (N.D.Ohio C.A. No. C 75-471, Dec. 22, 1975); *Dubose v. Harris*, (D.Conn. Civ. No. H-75-303); *Walter v. Harris*, (D.Conn. Civ. No. H-75-345); *Little v. Harris*, (D.Conn. Civ. No. H-75-345, Feb. 23, 1979); *Pleasant v. Harris*, (D.Conn. Civ. No. H-75-346); *Morales v. Harris*, (D.Conn. Civ. No. H-76-44); *Adams v. Harris*, (D.Conn. Civ. No. H-76-89) *Grundman v. Harris*, (D.Conn. Civ. No. H-76-160); *Johnson v. Harris*, (D.Conn. Civ. No. N-76-109). The

and the plaintiff classes in eleven of the lawsuits entered into a settlement agreement, which the District Court of Connecticut approved on February 23, 1979.[2]

Under the settlement, HUD turned over a $60 million fund (representing the amount of money HUD should have paid to tenants under the subsidy program) to an escrow agent who, pursuant to the provisions of the agreement, invested the fund for the benefit of the class members. Eventually, checks were mailed for past due tax and utility subsidy payments to over 150,000 eligible low-income tenants who were located after a nationwide search that involved, among other things, distributing claim forms to 4,613 federally subsidized housing projects.[3]

Western Center was not only involved in the lengthy and complex litigation that led to the $60 million settlement, but also played an important and extensive role in the administration and distribution of the fund.

I. Common Fund/Common Benefit Doctrine

Western Center asserts that it is entitled to attorneys' fees under the equitable common fund/common benefit doctrine. The Ninth Circuit, in *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981), outlined

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eight Connecticut suits were eventually consolidated. *Dubose v. Harris*, 82 F.R.D. 582, 583 n.1 (D.Conn.1979).

[2] The eleven suits included the eight Connecticut suits referred to in note 1, *Underwood v. Hills, supra, Harris v. Ross, supra,* and *Harris v. Abrams, supra. See Dubose v. Harris, supra,* at 583 nn.1, 3. Eventually members of the plaintiff classes in all the lawsuits listed in note 1 were allowed to receive benefits from the settlement.

[3] For a detailed discussion of the statutory scheme of the Housing and Community Development Act, the history of the litigation, and the settlement terms, *see Dubose v. Harris, supra.*

the prerequisites for an award of attorneys' fees under this rule:

> To qualify for an award under the equitable common fund or common benefit doctrine, the successful litigant must either impart a substantial nonmonetary benefit or create or preserve a common fund for an identifiable class of beneficiaries. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). The litigant is then entitled to recover attorneys fees from the benefitted class. Without such benefit accruing to or being preserved for an identifiable class, the litigant alone must bear the cost for the enrichment which may flow to others. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court acknowledged the viability of this doctrine, but limited its application to only where the class of beneficiaries is sufficiently identifiable, the benefits can be accurately traced, and the fee can be "shifted with some exactitude to those benefitting." *Id.* at 265 n.39, 95 S.Ct. at 1625 n.39. *See also, Stevens v. Municipal Court*, 603 F.2d 111 (9th Cir. 1979).

657 F.2d at 1122-33.

Western Center contends that its role in successfully representing the plaintiff class in the instant litigation satisifies these criteria and that the $60 million fund, plus earned interest, constitutes a "common fund" from which attorneys' fees may be paid. The settlement agreement, however, governs the distribution of the fund. That agreement explicitly provides that "[n]one of the funds distributed may be used to pay attorneys' fees." The term "funds distributed" is defined in paragraphs 2 and 3(f) of the agreement to include both principal and interest earned by the fund. There is, therefore, no *reachable*

"common fund" from which an award of attorneys' fees may be made and the common fund/common benefit doctrine is inapplicable.

II. The Equal Access to Justice Act

The Equal Access to Justice Act furnishes an alternative ground for granting attorneys' fees. The act provides that

> a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). *See generally* Dods and Kennedy, *The Equal Access to Justice Act*, 50 UMKC L.Rev. 48 (1981). Congress passed this provision to improve citizen access to courts and administrative proceedings by lessening the deterrent effect of litigation expenses incurred by persons who challenge governmental action. H.R.Conf.Rep.No. 96-1434, 96th Cong., 2d Sess. 21 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad.News 5003, 5010.

Through a favorable settlement, Western Center's clients prevailed in a suit against the United States, thereby satisfying one of the prerequisites for an award under the Equal Access to Justice Act.[4] HUD's counsel, however, challenges Western Center's request for attorneys' fees on four grounds.

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[4] Western Center's clients should be considered "prevailing" even though they prevailed through a settlement instead of a court order. Congress, in explaining that courts should interpret the phrase "prevailing party" consistently with the law that has developed under existing attorneys' fees statutes, specifically stated that under the Equal Access to Justice Act, "a party may be deemed prevailing if the party obtains a favorable settlement of his case, *Foster v. Boorstin*,

First, HUD notes that the Equal Access to Justice Act explicity applies to actions "pending on, or commenced on or after" October 1, 1981, Pub.L. 96-481, § 208, 94 Stat. 2330 (1980), 28 U.S.C. § 2412, and asserts that this case was not "pending" on the act's effective date.

No appellate courts have interpreted the word "pending" as employed in the Equal Access to Justice Act.[5] The legislation is, however, analogous to the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No.94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988. Under that statute, litigation is considered pending even if the only unresolved issue is whether to award attorneys' fees.

In discussing the Civil Rights Attorney's Fees Award Act in *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977), the Fifth Circuit said:

> the Supreme Court's decision in *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1973), *strongly suggests that a case is still pending even if the only remaining issue is that of attorneys' fees.* In *Bradley*, the Court authorized an award of attorneys' fees to plaintiffs in a school desegregation case under § 718 of the Education Acts Amendments of 1972, 20 U.S.C. § 1617,

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561 F.2d 340 (D.C. Cir.1979)." H.R. Conf.Rep.No.96-1434, 96th Cong., 2d Sess. 22 (1980); *reprinted at* [1980] U.S.Code Cong. & Ad.News 5010.

[5] The only reported case interpreting the meaning of "pending" as used in the Equal Access to Justice Act is *Berman v. Schweiker*, 531 F.Supp. 1149 (D.N.Ill.1982). In *Berman*, plaintiff successfully challenged a Social Security Administration denial of his request for revision of his Social Security earnings records. The court entered final judgment on September 2, 1981.

Plaintiff moved for attorneys' fees under the Equal Access to Justice Act. The court held that the action was still pending on the act's effective day of October 1, 1981, because the non-prevailing party's right to appeal had not expired or been exhausted.

even though (a) there were no pending or appealable orders in the case except for attorneys' fees and (b) § 718 had not been enacted until after initial submission of the case to the Court of Appeals. Although the Court in *Bradley* obviously did not consider the statute in the present case, the teachings of that case have direct applicability to the case at bar for two reasons. First, *Bradley* was not grounded on a specific consideration of § 718 but on the general principle that

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

416 U.S. at 711, 94 S.Ct. at 2016, 40 L.Ed.2d at 488. Second, several times in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 *Bradley* was cited as a prototypical case for awarding attorneys' fees in pending cases. Neither the statute itself nor its legislative history gives any indication of a congressional intent not to have the Act apply to cases in which attorneys' fees is the only pending issue.

> 551 F.2d at 676 (emphasis added) (footnote omitted). *See also Hartmann v. Gaffney*, 446 F.Supp. 809 (D.Minn. 1977).

In *Sethy v. Alameda City Water District*, 602 F.2d 894 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980), the Ninth Circuit adopted a similar position. There, the court reversed a district court's ruling that attorneys' fees could not be awarded because the case was not "pending" when the Civil Rights Attorney's Fees Awards Act was passed. When the act was passed, the only matter pending was the issuance of the circuit court's mandate, pursuant to Fed.R. App.P. 41(a), after an affirmance on appeal. Even though the Ninth Circuit had

resolved all issues in an opinion filed before the act's effective date, the court held that the technical lack of finality due to the non-issuance of its mandate sufficed to keep the case "pending." *Id.* at 897. In the instant case more is pending than a technical stamp of finality. A number of substantial issues remain unresolved. These include disposition of the remainder of the settlement fund, dispositon of the remaining interest earned by the fund, and determination of whether plaintiffs' counsel is entitled to attorneys' fees. HUD's counsel has failed to show why the teachings of *Bradley*, *Rainey*, and *Sethy* should not apply with equal force to the Equal Access to Justice Act.[6] Accordingly, this court concludes that this action is still pending for purposes of the act.

Second, HUD argues that Western Center is, at the very least, precluded from recovering fees for legal work done before October 1, 1981, the effective date of the act. This argument is unpersuasive. In *Bradley v. School Board of City of Richmond, supra*, the Supreme Court approved an award of attorneys' fees for work performed before the effective date of the Educational Acts Amendments of 1972, 20 U.S.C. § 1617, which provided for fees in connection with school desegregation cases. Again, in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the Court approved attorneys' fees awarded for work done before the effective date of the Civil Rights Attorney's Fees Awards Act. *See also Corpus v. Estelle*, 605 F.2d 175, 179 n.8 (5th Cir. 1979), *cert. denied*, 445 U.S. 919, 100

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[6] The Supreme Court has noted that statutes containing similar language and sharing a "common raison d'etre" should be interpreted "pari passu." *Northcross v. Board of Education of Memphis*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202, 37 L.Ed.2d 48 (1973). That principle applies here, as the attorneys' fee provisions at issue in *Bradley*, *Rainey*, and *Sethy* and the Equal Access to Justice Act share the common purpose of encouraging certain aggrieved individuals to seek redress in the courts.

S.Ct. 1284, 63 L.Ed.2d 605 (1980); *David v. Travisono*, 621 F.2d 464 (1st Cir. 1980). Because the attorneys' fees statutes involved in those cases and the Equal Access to Justice Act address similar concerns, this court concludes that the rationale of *Bradley, Hutto, Corpus,* and *David* applies here and that Western Center, if eligible to receive fees, is entitled to be compensated for all work done on the instant litigation.[7]

Third, counsel for HUD contends that Western Center is not entitled to fees because HUD was "substantially justified" in its defense of this action. Appellate courts have not yet interpreted the phrase "substantially

[7] HUD also contends that the clear waiver of sovereign immunity in the Equal Access to Justice Act does not waive immunity for work performed before the act's effective date.

This argument is unpersuasive. The Equal Access to Justice Act unequivocally waives sovereign immunity for "pending" cases. Courts have interpreted attorneys' fees provisions that apply to pending cases to allow fees for work performed before an act's effective date, *see Bradley, supra; Hutto, supra; Corpus, supra; David, supra,* and Congress is presumed to be familiar with pertinent case law. *See, e.g., United States v. Smith*, 521 F.2d 957, 968 n.24 (D.C.Cir.1975); *Kansas City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 275 (8th Cir.), *cert. denied*, 371 U.S. 912, 83 S.Ct. 257, 9 L.Ed.2d 171 (1962), 373 U.S. 914 (1963); *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, 213 F.Supp. 341, 345 (C.D.Cal.1963). *Cf. Shapiro v. U.S.*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948) (Congress, in re-enacting a statute, is presumed to adopt previous judicial construction of the statute.) Further, as noted *supra*, statutes containing similar language and sharing a "common raison d'etre" should be interpreted "pari passu." *Northcross, supra*. Thus, by applying the Equal Access to Justice Act to pending cases, Congress waived the sovereign immunity bar for work performed on those pending cases before the act's effective date.

Photo Data, Inc. v. Sawyer, 533 F.Supp. 348 (D.D.C.1982), reached the same conclusion. There, the court concluded that the Equal Access to Justice Act's provision for recovery of attorneys' fees in actions pending on its effective date authorizes fee awards for services rendered before the Act's effective date.

justified" as used in the Equal Access to Justice Act.[8] Congress, however, has suggested a specific criteria for lack of "substantial justification."

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict, where a prior suit on the same claim had been dismissed or where there is a substantial difference between the amount or content of the Government's original pleadings and the settlement agreed to. Such cases clearly raise the possibility that the Government was not substantially justified in pursuing the litigation.

H.R.Conf.Rep.No.96-1434, 96th Cong., 2d Sess. 9-22 (1980); *reprinted at* [1980] U.S. Code Cong. & Ad. News 5011.

Western Center points out that when *Underwood* was filed, all nine courts that addressed the question had already made preliminary or final rulings that HUD could not refuse to distribute the money in the reserve fund earmarked for tax and utility subsidy payments. *Underwood*

[8] The only reported case interpreting the meaning of "substantial justification" as used in the Equal Access to Justice Act is *Alspach v. District Director of Internal Revenue*, 527 F.Supp. 225 (D.Md.1981). In *Alspach* a taxpayer filed an action to enjoin the IRS from collecting an assessment on the ground that the IRS had failed to comply with the statutory notice requirement. The IRS answered the complaint before its trial counsel received and reviewed the file. After reviewing the file, trial counsel advised the taxpayer's attorney that the government would concede the case.

Plaintiff moved for attorneys' fees under the Equal Access to Justice Act. The court found that the government was reasonable in its initial opposition and subsequent concession and denied the attorneys' fees request. *Alspach* is readily distinguishable from the instant case where the government persisted in its position despite numerous court opinions to the contrary.

v. Hills, 414 F.Supp. 526, 528 (D.D.C.), *stay granted sub nom. Harris v. Underwood*, 429 U.S. 892, 97 S.Ct. 250, 50 L.Ed.2d 175 (1976), *applic'n to vacate stay denied*, 434 U.S. 993, 98 S.Ct. 626, 54 L.Ed.2d 488 (1977). In the face of these adverse decisions, HUD apparently took the position that it would pay the subsidies to low-income tenants only under specific court orders. The district judge handling the liability issues in the instant case[9] entered a permanent injunction even though plaintiffs had asked only for preliminary relief. While the mere fact of an adverse ruling does not raise a presumption that the government's position was not substantially justified,[10] the facts of the instant case "clearly raise the possibility that the Government was unreasonable in pursuing the litigation."

In rebuttal, HUD's counsel insists that the Supreme Court's grant of certiorari in two related cases, *Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D.Md.), *subsequent opinion*, 405 F.Supp. 831 (D.Md.1975), *aff'd mem.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom. Harris v. Ross*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded to the district court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978); *Abrams v. Hills*, 415 F.Supp. 550

[9] *Underwood v. Harris*, the instant case, was originally brought in the District Court for the District of Columbia. The district court consolidated plaintiffs' motion for preliminary injunction with trial on the merits and entered summary judgment for the plaintiffs. The Supreme Court stayed the decision pending disposition of two related cases. *Harris v. Ross*, *supra*; *Harris v. Abrams*, *supra*. Before the Court ruled on the related cases, plaintiffs in eleven pending suits settled with HUD. *See supra* note 2. The District Court for the District of Connecticut, where eight of the cases were originally brought, approved the overall settlement. *Dubose v. Harris*, *supra*. This case was then transferred to the Central District of California, where Western Center is located, for administration of the settlement fund.

[10] *See* H.R.Conf.Rep.No.96-1418, 96th Cong., 2d Sess. 10-11 (1980), *reprinted at* [1980] U.S. Code Cong. & Ad.News 4989-90.

(C.D.Cal.), *aff'd*, 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom. Harris v. Abrams*, 431 U.S. 928, 97 S.Ct. 2630, 53 L.Ed.2d 243 (1977), *remanded to district court for consideration of settlement*, 439 U.S. 1001, 99 S.Ct. 607, 58 L.Ed.2d 675 (1978), demonstrates that HUD's position was substantially justified.[11] While the Court might have granted the writ to set aside the numerous decisions rejecting HUD's position, it could have decided to take up the case to resolve the issues against HUD once and for all, thereby rejecting HUD's position which forced low-income tenants to bring class actions in district courts throughout the country. Furthermore, HUD eventually settled the class action cases essentially on the plaintiffs' terms. Such a settlement probably would not have materialized had HUD been confident that the Court would uphold its position. HUD, therefore, has failed to meet its burden of proving that its position was substantially justified.[12]

Finally counsel for HUD argues that this case presents a special circumstance that should make an award of fees unjust. HUD argues that because the settlement agreement provides that attorneys' fees are unavailable, an award of fees under the Equal Access to Justice Act would simply be unjust.

This argument is unconvincing. HUD misreads the agreement. It does not state that plaintiffs' counsel is precluded from receiving attorneys' fees from the United

[11] HUD's counsel also contends that HUD's position was substantially justified because this is a case of first impression. That may have been true of the first case filed, but by the time *Underwood* was decided, nine courts had already entered preliminary or final judgments, holding that HUD had no discretion to refuse to expend money in the reserve fund for tax and utility subsidies. *Underwood v. Hills*, *supra*, 414 F.Supp. at 531.

[12] The government has the burden of demonstrating sufficient justification for its position. H.R.Conf.Rep.No.96-1434, *supra* at 22, reprinted at [1980] U.S.Code. Cong. & Ad.News 5011. *See also Alspach v. District Director of Internal Revenue*, *supra*.

States. The agreement merely precludes an award of fees from the settlement fund established to benefit certain low-income tenants.

Aho v. Clark, 608 F.2d 365 (9th Cir. 1979), which neither party cited, does not require a finding that the instant case presents special circumstances rendering an award of fees unjust.[11] In *Aho* plaintiffs successfully challenged the adequacy of the Hawaii Board of Education's school breakfast program under the Child Nutrition Act, 42 U.S.C. § 1773. The request for fees was predicated on the Civil Rights Attorney's Fees Awards Act. This act provides that in civil rights suits the "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In holding that the district court did not abuse its discretion by denying fees, the Ninth Circuit pointed to a number of special circumstances which would have rendered an award unjust. First, the consent agreement, which expanded the school

[11] "Special circumstances" which render an attorneys' fees award unjust provide a basis for denying fees under other attorneys' fees statutes. *See* E.R. Larson, *Federal Court Awards of Attorney's Fees* 44-51 (1981). Courts, however, have rarely denied fees due to special circumstances. *Id.* Other than *Aho v. Clark*, *supra*, this court has uncovered only one circuit court decision upholding a ruling that special circumstances justified denial of fees to a prevailing plaintiff.

In *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), a case involving the validity under the Civil Rights Act of 1964 of a retirement plan established in 1942, plaintiffs successfully claimed that the plan illegally discriminated against males. The district court refused to award attorney's fees under 42 U.S.C. 2000-5(k). Such an award, although discretionary, is ordinarily made in Title VII actions absent special circumstances rendering an award unjust. On appeal, the Fourth Circuit concluded that special circumstances existed and that the district court had not abused its discretion. Those special circumstances included the reasonable dispatch displayed by the employer in correcting the discrimination as soon as murky areas of the law were clarified and the court's inability to conclude that plaintiffs' lawsuits were a contributing factor to the vindication of the plaintiffs' rights. Neither of those factors are present in the *Underwood* litigation.

breakfast program in Hawaii's public schools, made no provision for such an award even though plaintiffs asked for attorneys' fees in their complaint. The court, therefore, determined that an award of fees would alter the bargain struck by the parties and thus would be manifestly unfair to defendant. The court also noted that though the act was not in effect when suit commenced, it was in effect when a compromise was reached, so presumably the parties negotiated their settlement knowing that the new provision was operative.

Moreover, in concluding that the district court did not abuse its discretion by denying a fee award, the court of appeals noted that defendants were in the process of establishing a breakfast program when suit was filed; thus, the court was unable to conclude that litigation was needed to bring an existing program within federal standards, or that defendants manifested bad faith or obdurate conduct.

In contrast, when the *Underwood* suit was filed, HUD was not in the process of complying with Congressional directives to institute a tax and utility subsidy program for low-income tenants. The *Underwood* litigation and related suits were apparently needed to bring the subsidy program within federal requirements, a result resisted by HUD with some display of obdurate conduct.

It is also important to bear in mind that the Equal Access to Justice Act was not on the books when the parties signed the settlement agreement in *Underwood*. When the settlement was negotiated the common fund/common benefit doctrine provided the only realistic basis for a fee award, which plaintiffs' counsel agreed to forego since that could have reduced the amounts paid to low-income class members. Accordingly, one cannot say that an award of fees paid by the United States would alter the bargain struck by the parties and result in manifest unfairness to

the government. After all, Congress passed the Equal Access to Justice Act and explicitly made it applicable to litigation pending on the act's effective date. Presumably then, the government knew that the act could require it to pay fees in pending lawsuits including complex cases whose settlement agreements were being administered under court supervision, as is true of the *Underwood* litigation.

CONCLUSION

The above discussion demonstrates that Western Center is entitled to an award of attorneys' fees. Western Center represented the prevailing party in a civil action brought against an agency of the United States. The action was pending on the effective date of the Equal Access to Justice Act. Under that act, the government has the burden of proving that its position was substantially justified or that special circumstances would make an award of attorneys' fees unjust. Moreover, the act requires the court to award fees unless one of these two preclusive conditions are met. HUD has not shown that either condition exists here. Accordingly, Western Center's motion for an order of entitlement for attorneys' fees pursuant to the Equal Access to Justice Act is granted.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5773
D.C. No. CV 79-1318-HP

MYRNA UNDERWOOD, SHEILA FAZANDE, ANNIE JOHNSON, JEROME SMITH, CORA EWERS, FRANCES JARDIN, LURA R. STENTZ, CHARLOTTE WEST, ARITISHA MCGEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Central District of California

[FILED NOV. 18, 1986]

ORDER

Before: HUG and FLETCHER, *Circuit Judges*, and CARROLL*

The panel, as constituted in the above case, has voted unanimously to deny the petition for rehearing. Judges Hug and Fletcher have voted to reject the suggestion for a rehearing en banc, and Judge Carroll so recommends.

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* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 181-481/40257

OPPOSITION

BRIEF

FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1512

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

SAMUEL R. PIERCE, JR., Secretary of
Housing and Urban Development, Petitioner

vs.

MYRNA UNDERWOOD, et al., Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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I.

INTRODUCTION

Petitioner Samuel Pierce, Secretary of Housing and Urban Development ("HUD"), urges this Court to issue a writ of certiorari to consider two questions arising under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (Supp. 1987). The first question is whether the government must be presumed to have been substantially justified in Underwood. HUD asserts that because this Court stayed the Underwood injunction below and issued writs of certiorari in two similar cases, the government was justified, as a matter of law. HUD argues that the Ninth Circuit's Underwood decision to the contrary is wrong, and is at odds with Dubose v. Pierce, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516.

Respondents will demonstrate that because of the differences in the procedural histories and the government's conduct in Underwood and Dubose, the cases are not in conflict. Respondents will also establish that Congress has already identified the "objective indicia" by which the government's conduct should be measured, and that all of those indicia overwhelmingly establish that HUD was not substantially justified in Underwood. The fact of the issuance of a stay and writs should not countermand that conclusion.

The second question raised by HUD is whether the courts below in Underwood appropriately made an award based on hourly rates in excess of $75 based on properly identified "special factors." HUD asserts that Underwood stands for the proposition that high customary rates are themselves a "special factor" and that the effect of Underwood's analysis is that reasonable

market rates will be substituted in every EAJA case for $75 if market rates are higher. Respondents will demonstrate that HUD mischaracterizes Underwood and exaggerates its impact on EAJA case law.

Further, as argued below, this case is a singularly inappropriate vehicle for this Court to address the evolving law under EAJA. EAJA issues are in an embryonic stage of development. It may be too soon for this Court to take any EAJA case, Underwood included.

II.

UNDERWOOD IS AN INAPPROPRIATE VEHICLE FOR SUPREME COURT REVIEW OF EAJA LAW

Underwood was filed more than a decade ago, and plaintiffs first sought fees more than five years ago. Because of the passage of time and the intervening Congressional action to amend the EAJA and make it permanent, many of the issues raised in Underwood are now primarily of

only historical interest. Their resolution would have very limited precedential effect.

For example, the operating subsidy housing legislation has been repealed. A decision by this Court whether HUD was justified in its position on the merits will give little meaningful guidance in any future disputes. In addition, a decade has passed since this Court stayed the Underwood injunction, and the law on stays has since evolved. A discussion of the criteria for issuance of a stay in 1976 is, at best, of academic interest. Further, when Underwood was filed no statute provided for an award of fees to successful counsel. Thus the question of whether the availability of counsel was limited in Underwood is markedly different than in those cases filed since 1981; counsel are more readily available in all cases now

being filed because of the existence of EAJA.

In a sense, many of the EAJA issues in Underwood are either too idiosyncratic or too stale to merit Supreme Court consideration. Yet, in another sense EAJA issues generally are so new that Supreme Court intervention now into the area may be premature.

When the Equal Access to Justice Act was first enacted in 1981, it was an experiment. EAJA was to sunset in 1984 unless Congress, after studying its effectiveness, decided to act to make it permanent.

The 1984 and 1985 debates and the final amendments to EAJA have focused attention on specific issues that the courts below are just beginning to address.[1] Underwood is an inappropriate

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[1]For example, Congress discussed in 1985 a developing split of authority over whether "substantial justification" meant

case for examination of those issues since the 1985 EAJA, as amended, applies only to new cases. Pub.L. 99-80, Sec. 7, reprinted in 5 U.S.C.A. § 504, Note: Effective Date of 1985 Amendment.

Nonetheless, HUD suggests that the courts below are entering uncontrolled and excessive fee awards, thwarting the desire of Congress to put a lid on fees. HUD

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merely reasonable, or whether the test was more stringent. HUD has mentioned this debate in its Supplemental Brief for the Respondents in Dubose v. Pierce, No. 85-516 at 8, conceding that the "accompanying legislative history stated that the test for substantial justification 'must be more than mere reasonableness.' H.R. Rep. 99-110, 99th Cong., 1st Sess. 9 (1985)." Yet the government asserts that it will continue to argue that the test is simply reasonableness. Id. Some courts are siding with the government, but others are reading the 1985 legislative history to require a more liberal standard. Compare Russell v. National Mediation Board, 775 F.2d 1284, 1288-89 (5th Cir. 1985) with Gavette v. Office of Personnel Management, 785 F.2d 1568, 1579 (Fed. Cir. 1986)(en banc). Underwood does not present this Court with an opportunity to address that emerging issue. The Underwood courts applied a reasonableness standard under the original 1981 EAJA.

implies that the lower courts need to be curbed without delay.

HUD's view, however, is not shared by Congress.[2] When the original EAJA expired by its sunset provision, some four years of case law construing EAJA had developed. Congress, in reviewing that case law, had every opportunity to fashion rules that would, as HUD now seeks through litigation, make it more difficult to recover fees against the government or to recover fees in amounts greater than $75 per hour. Congress took precisely the opposite approach. Every amendment to EAJA made the standards for granting fee awards

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[2]Even the Department of Justice, when it listed for the President in 1984 its objections to EAJA, did not mention large awards or awards based on hourly rates in excess of $75 per hour as a problem needing correction during the amendment process. Department of Justice Memorandum Recommending the President Not Approve Legislation Reauthorizing the Equal Access to Justice Act, 42 Fed'l Contracts Report 788-90 (October 29, 1984).

more liberal than they had been under the original Act.[3] The only criticisms that the committee reports made of judicial decisions were directed at opinions that construed EAJA too narrowly. H.R. Rep. No. 99-120, 99th Cong., 1st Sess., at 9, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 137. And rather than adopt the view that fee award amounts were overly generous, Congress noted that the cost of EAJA was 1% of its original estimate. H.R. Rep. No. 99-120, supra, 1985 U.S. Code Cong. & Admin. News 132, 137; S. Rep. No. 98-586, 98th Cong., 2d Sess., at 6 (1984).

Thus, Congress left in place the provision which allows for awards greater than $75 per hour when a court finds that

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[3]See, e.g., Pub.L. 99-80, 99 Stats. 184 (1985), subsection (d)(2)(B), increasing the net worth of parties who are eligible for EAJA awards, and subsection (d)(1)(B), expanding the definition of "position of the United States" to expressly include the prelitigation agency action that gave rise to the suit.

special factors justify a higher amount. Not only is it premature for this Court to accept an EAJA case for review, it is unnecessary.

III.

THE UNDERWOOD AND DUBOSE DECISIONS DO NOT PRESENT A CONFLICT BETWEEN THE CIRCUITS NOR DO THEY RAISE AN IMPORTANT FEDERAL ISSUE IN NEED OF RESOLUTION BY THIS COURT

Substantial differences between Underwood and Dubose explain why plaintiffs' counsel in Underwood were awarded fees while counsel in Dubose were not. The central substantive issue on the merits in Dubose and Underwood was the same. Low-income tenants in both suits challenged the refusal of HUD to implement a now defunct "operating subsidy" program to benefit low-income people. HUD argued that the operating subsidy statute gave HUD the discretion to refuse to implement the program; tenants argued that the statute was mandatory.

The procedural histories and the government's litigation conduct in the two cases was, however, very different. These differences reflect that the outcomes of the two cases are not necessarily in conflict, and that the government was not "substantially justified" in Underwood.

Dubose was one of the first suits in the country to interpret the operating subsidy statutory language and the intent of Congress. But by the time Underwood was decided, HUD had lost each and every one of nine separate actions raising that identical issue.[4] One may argue that

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[4]Ross v. Community Services, Inc., 396 F.Supp. 278, subsequent opinion, 405 F.Supp. 831 (D. Md. 1975), aff'd mem., 545 F.2d 514 (4th Cir. 1976), cert. granted sub nom. Harris v. Ross, 431 U.S. 928 (1977), remanded to district court for consideration of settlement, 439 U.S. 1001 (1978); Dubose v. Pierce, supra; Abrams v. Hills, 415 F.Supp. 550 (C.D. Cal. 1975), aff'd, 547 F.2d 1062 (9th Cir. 1976), cert. granted sub nom. Harris v. Abrams, 431 U.S. 928 (1977), remanded to district court for consideration of settlement, 439 U.S. 1001 (1978); Harrison v. Hills (W.D. Pa. C.A. No. 75-938, Oct. 1, 1975); Carberry v.

Dubose was a legitimate test case on the limits of administrative discretion. Underwood, on the other hand, was a product of HUD's obdurance. Even though HUD lost operating subsidy cases repeatedly before a wide range of judges, it refused to pay subsidies on behalf of any low-income tenant unless the tenant was the beneficiary of a court order. Therefore Underwood was brought to obtain an injunction for everyone who had not yet sued.

When the Underwood plaintiffs moved for certification of the nationwide class action, however, HUD objected and argued

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Hills (D. Mass. C.A. No. 76-521-F, March 8, 1976); Parker Square Tenants Ass'n v. HUD (W.D. Mo. C.A. No. 75 C577-W-3, Jan. 27, 1976); Gertsch v. Hills, 414 F.Supp. 15 (D. Utah 1976); Folsom Gardens Action Comm. v. Hills (E.D. Cal. C.A. No. S-76-43-TJM, Feb. 12, 1976); Campbell v. HUD (N.D. Ohio C.A. No. C 75-471, Dec. 22, 1975). Dubose v. Pierce, supra, was actually eight consolidated cases, all filed by tenants in Connecticut. Thus, the figure of nine losses understates the extent of HUD's defeats in court.

that a separate class action should be brought by poor people at each of the more than four thousand affected apartment complexes in the country.[5] HUD's position by the time Underwood was filed[6] was so palpably wrong that although plaintiffs moved only for a preliminary injunction, the District Court judge, on his own motion from the bench, entered a summary judgment; he also granted a

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[5]Defendants' Memorandum In Support Of Its Opposition To Plaintiffs' Motion For Class Certification. U.S. District Court, Central District of California, Underwood v. Pierce, 79-1318-HP, Clerk's Record, document 11 at 12 (hereinafter cited as "Dist.Ct., C.R. ___ at ___"); United States Court of Appeals for the Ninth Circuit, Underwood v. Pierce, No. 83-5773, Appellees' Supplementary Excerpts of Record at 15 (hereinafter cited as "Ninth Cir., Supp.E.Rec. ___.")

[6]Subsequently, two U.S. Courts of Appeal held that HUD had to pay operating subsidies. Ross v. Community Services, Inc., supra, 544 F.2d 514; Abrams v. Hills, supra, 547 F.2d 1062. No court ever held to the contrary.

permanent injunction of nationwide effect. 414 F.Supp. 526 (D.D.C. 1976).

Later HUD settled Underwood and all the other operating subsidy cases for the total amount at stake on the merits. Under the terms of the Stipulation of Settlement, the government gave to Underwood plaintiffs' counsel the responsibility of locating all tenants in the country eligible for back payments, for setting up a claims processing procedure, for distributing claim forms and evaluating the merits of the claims made, and for investing and eventually distributing the $60 million settlement fund to claimants.[7] All activity in the operating subsidy cases moved to the Underwood court. Although Dubose was effectively resolved, counsel's work in

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[7]Stipulation of Settlement; Dist.Ct., C.R. 68; Ninth Circuit, Appellants Excerpts of Record at 134-135 (hereinafter cited as "Ninth Cir., E.R. ___.")

Underwood not only continued but became more difficult because of the nature of the settlement and HUD's continued unjustifiable and unreasonable conduct.

HUD retained some limited responsibilities after settlement. For example, HUD promised in the Stipulation of Settlement to give to plaintiffs' counsel within a reasonable period of time a list of the apartment projects it subsidized and the dollar amount by which tax and utility costs had increased at each of those complexes. Underwood counsel needed that data to locate eligible claimants and to compute how much they were entitled to.

HUD failed to complete even these simple responsibilities, to the amazement of the District Court judge.[8] Eventually

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[8]"[THE COURT: It] takes an attorney with a certain amount of patience--perhaps even an inordinate amount of patience--to handle this matter because of the level of frustration that was created by your office [HUD].

HUD provided a list of the projects, but for a year after the settlement was signed HUD was changing the information, adding what it called "newly discovered" projects and altering project names and addresses.[9]

In addition, HUD failed to provide the promised cost data; then admitted that it had a responsibility at least to estimate the information; then reneged on its

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"It made it very difficult. I was amazed that counsel was unable to get from HUD a complete list of all of the projects to which HUD sends money every month. That just astonished me." Underwood v. Pierce, U.S. Dist. Ct. C.D. Cal., No. CV-79-1318-HP, Reporter's Transcript of Proceedings, October 14, 1982, 30:23-31:7.

[9]Summary of Status Conference on Aug. 2, 1979, ¶ 5; Dist.Ct. C.R. 142 at 4; Ninth Cir. Supp.E.Rec. 32. Summary of Status Conference on Aug. 16, 1979, ¶¶ 4 & 5; Dist.Ct., C.R. 148 at 2-3; Ninth Cir., Supp.E.Rec. 2-3. Summary of Status Conference of Sept. 23, 1979, ¶ 4; Dist.Ct., C.R. 166 at 3; Ninth Cir., Supp.E.Rec. 48. Summary of Status Conference of October 5, 1979, ¶ 4; Dist.Ct., C.R. 176 at 2; Ninth Cir., Supp.E.Rec. 53.

agreement to make an estimate; then agreed to make estimates; but finally proved incapable of doing the job. Eventually Price Waterhouse & Co. had to compute the estimated cost data.[10] At the end of the settlement, Price Waterhouse estimated that HUD's failures to comply with the settlement agreement had increased the administrative costs of the settlement distribution by more than $1 million.[11]

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[10]Summary of Status Conference on Aug. 2, 1979, ¶ 6; Dist.Ct., C.R. 142 at 5; Ninth Cir., Supp.E.Rec. 33. Summary of Status Conference of August 16, 1979, ¶ 6; Dist.Ct., C.R. 148 at 3; Ninth Cir., Supp.E.Rec. 40. Summary of Status Conference of Sept. 23, 1979, ¶ 5; Dist.Ct., C.R. 166 at 3-4; Ninth Cir., Supp.E.Rec. 48-49. Summary of Status Conference of Oct. 5, 1979, ¶ 5; Dist.Ct., C.R. 176 at 3; Ninth Cir., Supp.E.Rec. 54. Summary of Status Conference of October 9, 1979, ¶ 2; Dist.Ct., C.R. 177 at 1-2, Ninth Cir., Supp.E.Rec. 57-58.

[11]Notice Of Motion and Motion For Contempt and Other Relief for HUD's Violations of Stipulation Of Settlement and For Order Requiring HUD to Reimburse Settlement Fund For Costs Incurred In Performing Tasks Agreed To Be Performed By HUD; Declaration of James C. Sturdevant and Exhibits;

The judge who spent years actively overseeing the settlement in Underwood had to evaluate a very different set of circumstances in deciding whether the government had been substantially justified in the course of Underwood than did the trial judge and Court of Appeals in deciding that issue in Dubose. It is understandable that the Underwood courts viewed the government's conduct as substantially unjustified while the Second Circuit did not. The two cases do not raise a conflict in the circuits in need of Supreme Court resolution.

Nonetheless, HUD urges this Court to grant review primarily to address one issue common to the two cases which HUD asserts is an important federal question which would be dispositive of the issue of

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Dist.Ct. C.R. 502; Ninth Cir. Supp.E.Rec. 86.

substantial justification in both actions--the significance of this Court's 1976 stay of the permanent injunction issued in Underwood. That issue, however, is not worthy of Supreme Court review. It will have little if any precedential value and would probably not even resolve the Underwood and Dubose cases.

HUD urges this Court to establish as a rule of law that a stay on behalf of the government constitutes "virtually conclusive evidence" or at least a "rebuttable presumption" that the government's position on the merits is substantially justified within the meaning of the Equal Access to Justice Act. Petition for a Writ of Certiorari at 9 (hereinafter cited as "HUD's Petition at __").[12] That rule of law, however, would

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[12]HUD also notes that the Underwood and Dubose courts reached different conclusions about whether its position was justified despite the fact that this Court granted petitions for writs of certiorari in two

be of so little precedential value that it does not merit Supreme Court consideration. The suggested rule would effect a future case only if: a plaintiff won at some stage of the case below on the merits in a suit

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other operating subsidy cases. Id. at 5.

Nonetheless, HUD does not suggest that this Court accept this case for review in order to rule that the issuance of a writ of certiorari raises a presumption about the merits of the government's position in the case below. Such a presumption would be plainly inappropriate in light of the black letter rule that the Supreme Court, in exercising its discretionary jurisdiction "is not primarily concerned with the correction of errors in lower court decisions. 'The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter, is the fact a case may have been rightly decided in itself enough to preclude certiorari.' [Justice Harlan, Manning the Dikes, 13 Record of N.Y.C. Bar Assn. 541, 551 (1958).] The Court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance." Stern, Gressman & Shapiro, Supreme Court Practice 221 (6th ed. 1986). Respondent's discussion above about the inappropiateness and unworkability of according presumptive weight to the issuance of a stay applies with equal force to the granting of a petition for writ of certiorari.

against the federal government; this Court stayed the effect of that decision or an identical decision in a similar case; plaintiff ultimately became the prevailing party either through a favorable settlement or because plaintiff's lower court victory was not reversed, despite the earlier stay; plaintiff then moved for fees under EAJA; the case was one of the type to which EAJA is applicable;[13] and the plaintiff was one of the persons or entities entitled to seek fees under EAJA.[14] HUD admits that "grant of a stay by this Court, of course, is not a factor that is likely to arise in run-of-the-mill EAJA litigation." (HUD's Petition at 10.) Indeed, it is conceivable that

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[13]EAJA not does provide for fees in tort suits against the federal government. 28 U.S.C. § 2412(d)(1)(A) (Supp. 1987).

[14]Only a party whose net worth is less than a specified amount may seek an EAJA fee award. 28 U.S.C. § 2412(d)(2)(B) (Supp. 1987).

Underwood and Dubose are the only cases in which all these factors will ever converge.

HUD also urges this Court to formulate "objective indicia" such as issuance of a stay by which to measure government conduct. (HUD's Petition at 9, 10.) Yet HUD ignores the fact that Congress has already done so, and that all the indicia identified by Congress indicate that the government was not substantially justified in Underwood. In effect, HUD is trying to substitute its single preferred objective indicium (the stay) for the multiple criteria of Congress.

In enacting the substantial justification language in EAJA, Congress directed the courts to consider whether the court was able to resolve a case easily on the pleadings (as happened here), whether a settlement was extremely advantageous to either party (as happened here), or whether

there had been earlier suits on the same issue (as happened here).

> "Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed or where there is a substantial difference between the amount or content of the Government's original pleadings and the settlement agreed to. Such cases clearly raise the possibility that the Government was not substantially justified in pursuing the litigation." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 reprinted in 1980 U.S. Code Cong. & Admin. News 4989-90.

All those Congressionally developed criteria reflect that Underwood was properly decided.

If this Court were to affix the label "rebuttable presumption" to its stays, the label would be of no practical significance in the resolution of the case. If the issuance of the stay raises a rebuttable presumption that the government's conduct

was substantially justified, then the fact that the government lost nine cases in a row is equally worthy of raising a rebuttable presumption that the government was not substantially justified in pursuing the tenth suit.[15] And the fact that the government settled for the entire amount in controversy should also raise a rebuttable presumption against the government.

Calling the indicia or factors "rebuttable presumptions" does not help a

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[15]As discussed above, the presence of these conflicting indicia helps explain why the courts in Underwood and Dubose reached different conclusions about the reasonableness of the government's position. The Underwood court did not, as HUD states, "refuse[] to attribute any significance to this Court's stay. . . ." (HUD's Petition at 8.) In fact, the Court of Appeals described each of a series of possible reasons why the stay may have been granted. 761 F.2d 1346. Since these reasons could have supported either a conclusion that this Court did consider the merits in granting a stay or a conclusion that it did not, the Underwood court understandably did not consider the stay dispositive.

court to decide a case in which the various indicia are conflicting. Nor does it simplify what the courts are already doing --reviewing all aspects of a case, and weighing the various factors in the exercise of their discretion, striking a balance on a case-by-case basis. This is the kind of analysis Congress anticipated under EAJA. "The Committee expects that the determination of what is 'substantially justified' will be decided on a case-by-case basis due to the wide variety of factual contexts and legal issues which make up government disputes." H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 10 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 138. Further discussion by this Court of the grounds for issuing a stay will not assist that process.

An Underwood Supreme Court opinion about the grounds for issuance of the stay

in this case would also have limited precedential effect even outside the context of EAJA cases. The issue in Underwood is what the courts below should have inferred from the granting of a stay in 1976, not the current criteria this Court is using in deciding to issue a stay.[16]

A decade ago the cases and expert commentary indicated that the Supreme Court could issue a stay for the sole purpose of preserving its jurisdiction over a later petition for writ of certiorari; in doing so the Court would not necessarily analyze whether the party seeking the stay would prevail on the merits. See, e.g., Stern &

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[16]When the Underwood stay was entered, the authorities cited by HUD on this point--Rostker v. Goldberg, 448 U.S. 1306 (1980) (Mr. Justice Brennan, J., in chambers) and the Sixth Edition of Stern, Gressman, & Shapiro, Supreme Court Practice (6th ed., 1986) (HUD's Petition at 9)--were not even in existence.

Gressman, Supreme Court Practice 850-51 (5th Ed. 1978).

It was not until several years later in the 1980's that the Supreme Court made the question of whether a case was correctly decided below arguably relevant to the issuance of stays in cases which would eventually reach the Court on a petition for certiorari.[17] See, for example, the discussion of this recent evolution in Stern, Gressman & Shapiro, Supreme Court Practice 693-94 (6th ed. 1986), and in "Prediction-Making in the Supreme Court: The Granting of Stays By Individual Justices," 32 U.C.L.A. L. Rev. 1020, 1032 (1985).

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[17]Even some recent post-Rostker decisions reflect that the Court may still issue a stay to preserve its jurisdiction without any consideration of the merits in a case that eventually will reach it on a petition for certiorari. See, e.g., Garrison v Hudson, 468 U.S. 1301, 1302 (1984) (Chief Justice Burger, in chambers).

Thus Underwood is a particularly inappropriate case for Supreme Court pronouncements on the current grounds for issuance of stays. A decision in Underwood discussing the inferences that should be drawn from the issuance of 1976 stays is of no practical value to anyone except HUD in this single case. The Petition for Writ of Certiorari on the "substantial justification" issue should be denied.

IV.

THE HOURLY RATE AWARDED IN UNDERWOOD DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW OR CREATE A CONFLICT IN THE CIRCUITS IN NEED OF SUPREME COURT RESOLUTION

EAJA limits attorney fee award rates to $75 per hour, "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)

(Supp. 1987). HUD urges this Court to accept Underwood for review in order to identify the special factors which could justify an hourly rate in excess of $75. HUD asserts that this is an important issue "of considerable practical significance, since the issue here may arise with great frequency." (HUD's Petition at 16.)

In fact, awards based on hourly rates in excess of $75 per hour are not common. As HUD points out, during the last fiscal year the federal courts awarded fees in 555 EAJA cases. Id. Yet HUD itself has cited to only five cases in which awards based on hourly rates in excess of $75 per hour were entered because of the existence of "special factors"[18] and have survived

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[18]Some EAJA awards have exceeded $75 per hour not because of special factors but instead solely because of cost of living increases. See, e.g., Hirschey v. F.E.R.C., 777 F.2d 1, 5 (D.C. Cir. 1985).

appeal.[19] Underwood; Inter. Woodworkers of America v. Donovan, 769 F.2d 1388 (9th Cir. 1985), reprinted as modified, 792 F.2d 762 (9th Cir. 1986); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), modified, 796 F.2d 309 (9th Cir. 1986); Hyatt v. Heckler, 579 F.Supp. 985, 586 F.Supp. 1154 (W.D.N.C. 1984), vacated and remanded, 757 F.2d 1455 (4th Cir. 1985), 618 F.Supp. 227 (W.D.N.C. 1985), cert. granted, vacated and remanded, 106 S.Ct. 2886 (1986), on remand, 807 F.2d 376 (4th Cir. 1986); and Action on Smoking & Health v. CAB, 724 F.2d 211 (D.C. Cir. 1984).

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[19]HUD discusses one additional case in which, at an earlier stage of litigation, an award was based on rates in excess of $75 per hour, but the award was subsequently reversed on appeal. Miller v. Hotel & Restaurant Employees, 107 F.R.D. 231 (N.D. Cal. 1985), reversed, 806 F.2d 1371 (9th Cir. 1986). This case is discussed in some detail below.

The fact that awards based on more than $75 per hour are awarded relatively infrequently is reflected in the meagerness of the typical EAJA award. During the last fiscal year EAJA awards averaged only $4,564 per case for fees, expert witnesses, travel, and other expenses. Report of the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, September 18, 1986 ("Admin. Office of Courts Report") at 2, Table 1.[20] Given the infrequency of awards based on rates in excess of $75 per hour because of a "special factor", the

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[20]That $4,564 average figure reflects the amount originally awarded, not the amount actually received. Many of the awards are appealed. Thus even the $4,564 figure is inflated. Id. Moreover, the average award has shrunk dramatically over the last five years. In 1982 the average was $63,667, in 1983 it was $16,218, in 1984 it was $8,537, and then it leveled out at $4,554 in 1985 and $4,564 in 1986. Id.

relatively modest size of the awards, and the fact that even an extremely narrow reading of the term "special factor" would only result in partial reductions of awards (since the amount based on $75 per hour would be unaffected), the practical significance of the special factor issue is inadequate to merit this Court's consideration at this time.

HUD overstates the practical significance of EAJA hourly rate decisions generally, and of Underwood in particular. HUD characterizes Underwood as a case in which "the court of appeals' approach would render EAJA's $75-per-hour cap nugatory." HUD's Petition at 15. To the contrary, a close analysis of the case reflects that Underwood was recognized by the courts below as an extraordinarily special case which cannot be, and has not been, read as

a precedent for ignoring the $75 per hour cap in ordinary EAJA cases.

In setting the hourly rate, the District Court first noted that the one special factor which EAJA expressly identifies --limited availability of qualified attorneys--standing alone justified a fee in Underwood computed on the basis of rates in excess of $75 per hour. Underwood v. Pierce, No. 79-1318-HP, Memorandum and Order, HUD's Petition, Appendix C at 15a. That conclusion was based on detailed factual evidence presented by plaintiffs (Declarations of Charles F. Palmer, Cheryl White Mason, Carlyle W. Hall, Jr., and Terry Friedman, Ninth Cir. Supp.E.Rec. 61, 68, 71 & 74), and on the fact that HUD presented no evidence in rebuttal.[21]

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[21]HUD, however, characterizes the Court's findings as a bald assertion which could not possibly be supported. HUD paints

The District Court then went on to explore other aspects of the case which

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Underwood as a run-of-the-mill case that was "resolved by the district court in less than three months, without trial and with minimal discovery, on the basis of arguments that already had been briefed elsewhere." HUD's Petition at 14, n.4. HUD is describing, however, only the first few months of what became an effort of more than seven years and 3,300 hours of work.

HUD further suggests that the very fact that the Underwood plaintiffs were able to find someone to represent them without charge proves that counsel were available, and therefore that there could not have been a "limited availability" of counsel within the meaning of EAJA. Id. The circularity of HUD's reasoning is stunning --if a plaintiff could find one attorney who would work without being paid more than $75 per hour by plaintiffs, then by definition the availability of counsel was not limited and the attorney is only entitled to an award of $75 per hour.

Under this reasoning only attorneys who extract a high fee from plaintiffs in advance are entitled to receive more than $75 per hour based on the limited availability of counsel. That outcome is contrary to HUD's own characterization of the purpose of the fee cap--to prevent parties from hiring expensive law firms and recovering the excessive fees under EAJA. HUD's Petition at 11.

HUD's analysis, if adopted, would discourage private attorneys from charging

made it special. These included counsel's "tireless dedication and devotion in managing this protracted litigation and in administering its complex settlement agreement," performing services "of the highest calibre." Underwood v. Pierce, supra, HUD's Petition at 17a.

> "This case involved the largest class action settlement fund--$60 million--ever administered by legal aid counsel. After a nationwide search, about $45 million was distributed to more than 145,000 eligible poor persons. The overall plan of administration required counsel to develop a unique formula for distribution of funds, to create effective and fair claims processing procedures, to institute complex fraud control systems, to launch an extensive media campaign to locate class members, and to carry out other programs, all tailored especially for this case." Id. at 16a.

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plaintiffs discounted fees or from taking cases pro bono. It would also ensure that legal aid attorneys, who represent indigents for free, will be compensated less under EAJA than private attorneys. Cf. Blum v. Stenson, 465 U.S. 886, 892-96 (1984) (legal aid counsel and private attorneys should be compensated on same basis under Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988).

Underwood was an anomaly among EAJA cases in almost all respects. The vast majority (nearly 88%) of EAJA awards involve challenges to the termination of social security disability benefits. Admin. Office of Courts Report, supra, at 1. By contrast, Underwood was a nationwide class action challenging the administration of national housing policy. Counsel spent more than 3,300 reimbursable hours on Underwood over a six year period. Underwood v. Pierce, supra, HUD's Petition at 20a. As the District Court recognized, Underwood was an extraordinary and unique EAJA case replete with special factors, however defined.

In affirming, the Ninth Circuit first cited the District Court's finding about the limited availability of counsel. The Court of Appeals then noted without comment the other special factors discussed below,

and affirmed the award on the ground that the District Court had not abused its discretion. 761 F.2d at 1347. The Ninth Circuit did not say, nor has any court implied that it meant, that attorneys compensated under EAJA should always receive more than $75 per hour if the otherwise reasonable and customary rate would be higher.

HUD overstates its case when it asserts that "[t]he court of appeals' decision effectively reads the fee cap out of EAJA. . . . [T]his approach has been followed by district courts both inside and outside the Ninth Circuit. [Citations omitted.] In these circumstances, review of the decision below is warranted." HUD's Petition at 16-17.

An analysis of the three cases cited by HUD evidences that HUD's concern about the broad reach of the Underwood decision

and its impact on the supposed demise of the $75 per hour cap is misplaced.

In the first case, Miller v. Hotel & Restaurant Employees, 107 F.R.D. 231 (N.D. Cal. 1985), reversed, 806 F.2d 1371 (9th Cir. 1986), the entire fee award has been reversed on the ground that the government was substantially justified on the merits. The original District Court decision did, however, cite Underwood for the proposition that it is proper to consider the twelve factors listed in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976), in setting an EAJA fee award. 107 F.R.D. at 242. But the court then discussed only the Kerr factors that were unusual and special in Miller and that justified a modest increase to $85 per hour--exceptional results, novelty and

difficulty of the questions and the high quality of the representation. 107 F.R.D. at 242. The court did not even mention the customary reasonable rate, and neither stated nor implied that it viewed Underwood as authorizing consideration of that rate as a special factor.

HUD also cites to Hyatt v. Heckler, 579 F.Supp. 985, 586 F.Supp. 1154 (W.D.N.C. 1984), vacated and remanded, 757 F.2d 1455 (4th Cir. 1985), 618 F.Supp. 227 (W.D.N.C. 1985), cert. granted, vacated and remanded, 106 S.Ct. 2886 (1986), on remand, 807 F.2d 376 (4th Cir. 1986), to support its assertion that courts are using the Underwood case as precedent for awarding customary rates under EAJA by using those rates as special factors. Yet in Hyatt v. Heckler, the court noted what the customary rate would be ($125 per hour), but awarded considerably less ($95), despite the

limited availability of counsel. 807 F.2d at 382-83.

Bunn v. Bowen, 637 F.Supp. 464 (E.D.N.C. 1986) is the last case cited by HUD as evidence that the Underwood analysis is influencing courts to substitute customary reasonable rates for the $75 per hour cap. To the contrary, in Bunn the court refused to award more than $75 per hour because it found that no special factor within the meaning of EAJA justified it, despite the fact that the reasonable rate would have been $85 per hour.[22]

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[22]This is often the fate of requests for fees in excess of $75 per hour based on special factors. See, e.g., Fincke v. Heckler, 596 F.Supp. 125, 129 (D. Nev. 1984) (District Court found $90 per hour reasonable, but awarded $75); Blanchette v. Heckler, 586 F.Supp. 903, 906-07 (D. Colo. 1984) (plaintiffs paid counsel $90 per hour, but District Court awarded reimbursement for only $75); Mental Health Ass'n of Minnesota v. Heckler, 620 F.Supp. 261, 263 (D. Minn. 1985) (market rate average was more than $85 per hour, but court awarded $75); Chipman v. Secretary of Health and Human Services, 781 F.2d 545,

> "[W]hen . . . a reasonable hourly rate should be $85 per hour, the only way the court may award that rate is if it further finds that one of the factors it considered in determining the rate constitutes an exceptional or 'special factor.' If it does not, then despite the fact that counsel might customarily charge and receive that rate for equivalent services rendered, the court must abide by the $75 Congressional limit." Id. at 477.

Close analysis of Bunn, Hyatt and Miller reflects that Underwood has not led other courts to treat customary reasonable rates as a special factor, and then to substitute them for the EAJA fee cap. The Nint.. Circuit did not do that in Underwood[23] and other courts have not done

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547 (6th Cir. 1986) (customary rate was $100-200 per hour, but court awarded $75).

[23]In the other two Ninth Circuit EAJA decisions which have approved awards in excess of $75 the Court of Appeals did not treat high customary rates as a special factor. LaDuke v. Nelson, supra, 762 F.2d 1318; and International Woodworkers v. Donovan, supra, 792 F.2d 762.

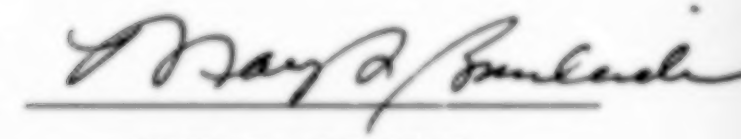
so in reliance on Underwood. This case does not require Supreme Court review.

V.

CONCLUSION

The Underwood case began more than a decade ago, and the fee dispute has dragged on for five years. This litigation should end. HUD's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By: 

MARY S. BURDICK
Western Center on Law & Poverty
Attorney for Respondents

April 17, 1987

CERTIFICATE OF SERVICE

I, MARY S. BURDICK, a member of the Bar of this Court, HEREBY CERTIFY that on April 17, 1987, true and correct copies of the OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT were mailed, pursuant to Rule 28, Rules of the Supreme Court of the United States, by depositing same in the United States mailbox, with Express Mail postage, to the following party:

CHARLES FRIED, Solicitor General
RICHARD K. WILLARD, Ass't. A.G.
ALBERT G. LAUBER, JR.,
Deputy Solicitor General
CHARLES A. ROTHFELD, Assistant
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DATED: April 17, 1987

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REPLY BRIEF

Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1512

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAMUEL R. PIERCE, JR., SECRETARY
OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. In arguing that the Court should not review this case to determine whether the government's position in the operating subsidy litigation was substantially justified within the meaning of the Equal Access to Justice Act (EAJA), respondents make a number of points that we do not dispute. It is certainly true, as respondents note and as we acknowledged in our petition (at 10), that a superior court's decision to stay a lower court's judgment will not be a factor that is likely to arise in run-of-the-mill EAJA

litigation. Respondents also are correct in noting differences in the state of the law at the respective times that *Dubose* v. *Pierce*, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516, and this case were decided by the district courts, differences that we recognized in our supplemental brief (at 6 n.3) in *Dubose*. And we find no fault with respondents' suggestion that the disagreement between the Second and Ninth Circuits about the nature of the government's obligations under the now-defunct operating subsidy legislation does not, in and of itself, warrant this Court's consideration (see *Dubose* Supp. Br. at 5).[1]

Respondents, however, miss the larger point of our petition. They do not—and could not—deny that the courts of appeals have, in the absence of clear guidelines governing the resolution of EAJA disputes, reached seemingly conflicting conclusions in cases presenting quite similar issues. See *Dubose* Supp. Br. at 6-7. That development is well illustrated here: the Second and Ninth Circuits expressed irreconcilable views about the significance both of the settlement and of the stays in the operating subsidy litigation. See Pet. 8-9.[2] Review of the decision below accordingly could offer the Court an opportunity to provide guidance to the lower courts about the nature of the EAJA "substantial justification" inquiry.

[1] While respondents are correct in stating that this case involved lengthy post-settlement activity while *Dubose* did not (Br. in Opp. 13-17), that consideration is simply irrelevant to the substantiality of the government's pre-settlement legal position on the operating subsidy question.

[2] Respondents assert (Br. in Opp. 24-27) that this Court's criteria for issuing stays have changed in recent years and that, in 1976, the grant of a stay entailed no consideration of the substance of the applicant's position. This assertion is incorrect. See, *e.g.*, *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers) ("[T]here must be a significant possibility of reversal of the lower court's decision."); *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1305 (1976) (Rehnquist, J., in chambers) (considering "probability of success on the merits" in vacating stay). Although this Court and its individual Justices have used various formulae in considering stay applications over the years, those formulae have generally entailed *some* consideration of the merits of the question sought to be presented. See *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (stating that the prospect of reversal is related to the question whether four Justices "will consider the issue sufficiently meritorious to grant certiorari"); *Edwards* v. *New York*, 76 S.Ct. 1058, 1059 (1956) (Harlan, J., in chambers) (stating test as "whether any of these matters is sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari"). In the operating subsidy litigation, this Court not only issued a stay, but granted certiorari in the absence of a circuit conflict.

2. Respondents' defense of the hourly rate used to calculate the fee award in this case is without merit. We do not dispute respondents' statement (see Br. in Opp. 32-34 & n.21) that the post-settlement activity here was lengthy,[3] and we do not dispute the ability or dedication of respondents' counsel (see Br. in Opp. 34-35). But this Court has held that those factors are presumptively reflected in the number of hours billed and in the attorney's hourly rate, and thus in the lodestar. See Pet. 15. Respondents have offered no reason to believe that either of those considerations—or any of the other factors taken into account by the court of appeals—justifies a departure

[3] In fact, however, much of the post-settlement activity of respondents' counsel was devoted to administering the settlement; counsel received compensation for time spent learning how to publicize the settlement and draft routine billing requests. See C.A. Record Excerpts 377-548.

from EAJA's $75-per-hour fee cap. We showed in our petition (at 14-16) that treating such considerations as statutory "special factors" would conflict with the decisions of other circuits, and respondents nowhere contest that proposition. To the contrary, respondents defend the opinion below primarily by asserting that the court of appeals did not mean what it said (see Br. in Opp. 35-36, 40-41). That assertion is belied by the fees actually awarded by the courts below.

Respondents also are incorrect in asserting that a departure from the $75-per-hour rate was justified in this case by the one "special factor" actually mentioned in EAJA, the limited availability of qualified attorneys. As we explained in the petition, the District of Columbia and Tenth Circuits have held that this factor may be invoked only in the "unusual situation where appropriately specialized legal services cannot be obtained in the market for $75 [an hour] or less." *Vibra-Tech Engineers, Inc.* v. *United States*, 787 F.2d 1416, 1420 (10th Cir. 1986). See *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 217 (D.C. Cir. 1984). In their carefully worded argument, respondents make no claim that this case involved such a situation, and they make no claim that the courts below found them incapable of obtaining representation at a rate of $75 per hour (see Br. in Opp. 31 & n.21).[4] In these circumstances, the other courts of

[4] In the petition (at 14 n.4), we explained that the courts below *could not* have found an unavailability of counsel willing to undertake the representation here for $75 per hour or less: respondents' lawyers embarked on the representation in this case several years prior to the enactment of EAJA, when they could have had no expectation of a fee award—and they expressly disavowed any intent to obtain a fee from the settlement fund. This establishes conclusively that a departure from the $75-per-hour cap was not necessary to attract qualified counsel. Our reasoning does not mean, as respondents argue (Br. in Opp. 32-33 & n.21), that a party who hires an expensive law firm is entitled to EAJA fees at more than the $75-per-hour rate; if that person could have obtained representation for a fee of $75 per hour, the "limited availability of qualified attorneys" exception would not come into play. Respondents also are incorrect in asserting (Br. in Opp. 34 n.21) that application of the statute as written would mean lower compensation for public interest attorneys than for private attorneys. Both would receive an identical "reasonable fee," with $75 per hour as the cap on the rate.

appeals would not have approved a fee awarded at rates in excess of $75 per hour.[5]

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1987

[5] Respondents also argue (Br. in Opp. 28-29) that the $75-per-hour issue is of limited importance because it has, thus far, arisen infrequently. In fact, the petition's list of cases involving such awards is not exclusive. See also *Henderson* v. *Bowen*, No. S-84-0011-EJG (E.D. Cal. Feb. 7, 1987), appeal pending, No. 87-1859 (9th Cir.); *Barry* v. *Heckler*, 638 F. Supp. 444 (N.D. Cal. 1986), appeal pending, No. 86-1802 (9th Cir.); *Louis* v. *Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986), appeal pending, No. 86-5887 (11th Cir.). In any event, the issue may arise in every EAJA claim; given the court of appeals' decision in this case, excessive awards are likely to become considerably more common in the future.

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PETITIONER'S

BRIEF

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QUESTIONS PRESENTED

1. Whether the government was "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. III) 2412(d), in litigating a question on which this Court, at the government's request, eventually granted certiorari and issued a stay.

2. Whether the courts below properly identified the "special factors" that justify a departure from EAJA's usual $75-per-hour fee cap.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1512

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 761 F.2d 1342. A subsequent amendment to the opinion of the court of appeals (Pet. App. 1a-2a) is reported at 802 F.2d 1107. The opinion of the district court concerning the liability of the United States for attorneys' fees (Pet. App. 22a-36a) is reported at 547 F. Supp. 256. The opinion of the district court regarding the amount of the fee award (Pet. App. 14a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. A timely petition for rehearing

was denied on November 18, 1986 (Pet. App. 37a-38a). On February 11, 1987, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1987. The petition was filed on that date and was granted on May 18, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. (Supp. III) 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort) * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * * * *
>
> (2) For purposes of this subsection—
>
> (A) "fees and other expenses" includes * * * reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);
>
> * * * * *

STATEMENT

1. Congress enacted the Equal Access to Justice Act (EAJA or Act), 28 U.S.C. (Supp. III) 2412(d), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. The Act does not mandate atuomatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. (Supp. III) 2412(d)(2)(B)) that prevails in a nontort civil action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. (Supp. III) 2412(d)(1)(A).

EAJA also differs from many fee-shifting statutes in that it contains a specific statutory cap on permissible fee awards. The Act provides that fees generally are to be computed on the basis of "prevailing market rates for the kind and quality of the services furnished." 28 U.S.C. (Supp. III) 2412(d)(2)(A). But the statute conditions this general rule by directing that fees "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *Ibid.*

2. This attorneys' fee dispute arose out of respondents' challenge to a decision by the Secretary of Housing and Urban Development (HUD) not to implement an "operating subsidy" program for tenants of certain low-income housing projects. That program was one of several subsidy programs created

by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 212, 88 Stat. 673; it was repealed by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 322(f), 95 Stat. 403. The operating-subsidy program was designed to offset rent increases for low-income tenants attributable to project owners' rising utility expenses and property taxes; the Secretary was "authorized to make, and contract to make, additional assistance payments to the project owner" to compensate for such cost increases. 12 U.S.C. (Supp. IV 1974) 1715z-1(f)(3). The Secretary, however, determined that Congress had failed to provide her with sufficient contract authority to effectuate all of the subsidy programs authorized by the 1974 Act, and she accordingly concluded that she had discretion to decline to implement the operating-subsidy program. See *Dubose* v. *Pierce*, 761 F.2d 913, 916 (2d Cir. 1985), petition for cert. pending, No. 85-516.

The Secretary's decision not to implement the program gave rise to a series of lawsuits, including the *Dubose* litigation and the instant action, which was originally brought in the United States District Court for the District of Columbia and subsequently transferred to the Central District of California. See *Underwood* v. *Hills*, No. 76-469 (D.D.C. Apr. 5, 1979). Although the instant case was resolved adversely to the Secretary in district court (414 F. Supp. 526 (D.D.C. 1976)), this Court granted the Secretary's application for a stay of the district court's judgment pending a decision by the court of appeals (429 U.S. 892 (1976)). The Second Circuit in *Dubose* similarly granted the Secretary's motion for a stay of the district court's adverse judgment in that case (see *Dubose* v. *Pierce*, 761 F.2d at 919-

920), and this Court denied a motion to vacate the Second Circuit's stay (*Dubose* v. *Harris*, 429 U.S. 1085 (1977)).

This Court subsequently granted the Secretary's petitions for writs of certiorari in two other operating-subsidy cases. *Harris* v. *Ross*, 431 U.S. 928 (1977); *Harris* v. *Abrams*, 431 U.S. 928 (1977). Before the Court could resolve the merits of the operating-subsidy dispute, however, the plaintiffs in the various cases and a new Secretary of HUD reached a comprehensive settlement. See generally *Battles Farm Co.* v. *Pierce*, 806 F.2d 1098, 1100 (D.C. Cir. 1986), petition for cert. pending, No. 86-1661.[1] This Court thereupon granted the Secretary's motion to refer the two cases on which certiorari had been granted back to the respective district courts for consideration of the settlement (439 U.S. 1001 (1978)).

Several years later, while the settlement was still being administered, plaintiffs' counsel in a number of the operating-subsidy cases, including this one, moved

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[1] Under the terms of the settlement, HUD made available a fund of approximately $60 million to reimburse tenants and project owners for their increased costs. See *Dubose* v. *Pierce*, No. 85-516 Pet. App. at 119. The agreement provided that ~~of plaintiffs' counsel, with~~ the cost of settlement administration would be paid partially out of the settlement fund and partially by HUD (*id.* at 123-124). The settlement agreement further provided that "[n]one of the sums distributed may be used to pay attorney's fees" (*id.* at 121), and that "any money which remains after [payment of all claims and settlement costs assigned to HUD] * * * shall be returned to HUD and shall be credited to the reserve fund established by Section 236(g) of the National Housing Act, as amended" (*ibid.*).

for attorneys' fees and expenses under EAJA, which had been enacted in 1980. On March 25, 1982, the district court held that the plaintiffs in this case were entitled to a fee award, determining that the government's position in the operating-subsidy dispute had not been "substantially justified" within the meaning of the Act (Pet. App. 30a-36a). The court noted that when the action here was filed, nine district courts "had already made preliminary or final rulings" adverse to HUD in operating-subsidy cases (*id.* at 31a). This background, in the court's view, "clearly raise[d] the possibility that the Government was unreasonable in pursuing the litigation" (*id.* at 32a (original quotation marks omitted)). The district court declined to attach any weight to this Court's grant of the Secretary's petitions for writs of certiorari in the two related cases, explaining that the Court might have "decided to take up the case[s] to resolve the issues against HUD once and for all" (*id.* at 33a). And noting that HUD eventually settled the operating-subsidy cases "essentially on the plaintiffs' terms," the district court reasoned that "[s]uch a settlement probably would not have materialized had HUD been confident that the Court would uphold its position" (*ibid.*).

Some ten months later, the district court set the fee award (Pet. App. 14a-21a), concluding that several factors justified a departure from the usual EAJA $75-per-hour cap. While the court did not in terms find that a fee in excess of $75 per hour was necessary to attract qualified attorneys, it did state that "[f]ew attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case" (*id.* at 15a). Relying on *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976),[2] the court then held that there also were "[o]ther special factors" here that "justif[ied] a fee award in excess of $75 per hour" (Pet. App. 15a). These included the supposed "novelty and difficulty of the issues" (*id.* at 16a), the "contingent nature of the fee and the undesirability of the case" (*id.* at 17a), the "high[] calibre" of the work performed by respondents' counsel (*ibid.*), and "prevailing market rates" (*ibid.*). The court therefore found it appropriate to award fees at rates ranging from $80 and $85 per hour for work performed in 1976 to $120 per hour for work performed in 1982. Using those rates, the court calculated a lodestar of $322,700. *Id.* at 20a.[3]

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[2] *Kerr* adopted the 12 factors for calculating an attorneys' fee that are set out in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

[3] After setting the lodestar, the district court multiplied that figure by 3.5 to compensate respondents' attorneys for "the contingent nature of this case, its complexity, and, most importantly, the high quality of [counsel's] work, and the excellent results achieved." The court therefore entered a final fee award of $1,129,450. Pet. App. 20a. This use of a multiplier was set aside by the court of appeals. In its initial opinion, the court of appeals held that reference to a multiplier is inappropriate under EAJA, for two reasons: because EAJA, unlike other fee-shifting statutes, "places a specific dollar limit on the hourly rate to be awarded" (*id.* at 13a), and because "[t]here is insufficient indication that Congress intended to expose the United States to compounds of the hourly rate" (*ibid.*). On rehearing, the court of appeals withdrew this aspect of its opinion, finding it unnecessary to decide "whether the use of a multiplier is permissible under the statutory language of the EAJA" (*id.* at 2a). Instead, the court concluded that "compensation for the special factors

3. The court of appeals affirmed the award of fees (Pet. App. 3a-13a), finding for several reasons that the government's position was not "substantially justified." First, the court noted that a number of district courts had rejected the Secretary's position, "thus put[ting] [him] on clear notice that his position was without legal basis, but he continued to litigate the issue" (*id.* at 9a). The court also reasoned that the Secretary's decision to settle the litigation on terms that provided the plaintiffs with the requested relief "undermined" his contention that his legal position was supportable (*ibid.*). Conversely, the court of appeals refused to accord any weight to this Court's stay of the district court's judgment in the instant case or to its grant of certiorari in two related operating-subsidy cases, declining to "speculate as to the Court's intent in issuing those orders" (*ibid.*). Instead, the court found that the district court's decision on the merits in this case "establishe[d] that the Secretary had no reasonable basis in law to ignore the mandates" of the legislation establishing the operating-subsidy program (*ibid.*).

While the court of appeals found the use of a multiplier inappropriate (see note 3, *supra*), it did agree with the district court that fees should be awarded here at rates exceeding $75 per hour. The court of appeals noted the trial judge's statement that few attorneys possess the requisite skill to handle cases like this one. Pet. App. 11a. And referring to the district court's use of the multi-factor analysis set forth in *Kerr* v. *Screen Extras Guild*, *supra*, the court of appeals held that "consideration of [the] *Kerr*

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involved in this case was adequately provided for by the allowance of the hourly rates in excess of the $75.00 specified in the statute" (*ibid.*).

factors is appropriate in determining the amount of fees to be awarded under the EAJA" (Pet App. 11a). The court explained (*id.* at 11a-12a):

> The district court found that an hourly rate in excess of $75 was justified by several special factors, including the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases. The district court did not abuse its discretion in concluding that the hourly rates requested by [respondents' counsel]—ranging from $80 per hour for work in 1976 to $120 per hour for work in 1982—were appropriate and reasonable under the EAJA.

The court of appeals therefore affirmed a fee award of $322,700 (*id.* at 13a).

SUMMARY OF ARGUMENT

A. 1. In making the government liable for fees under EAJA when its position is not "substantially justified," Congress sought to balance two policies: it hoped to encourage challenges to "unreasonable governmental action" (Pub. L. No. 94-481, § 202(a), 94 Stat. 2325), while at the same time not discouraging government officials from discharging their duties under the law. It follows, both from this statutory language and from the congressional purposes, that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 22 (1980). As Congress emphasized, this standard neither raises a presumption that

the government should be liable for fees whenever it loses a case nor requires the government to establish that its decision to litigate was based on a substantial probability of prevailing. Instead, the government may avoid liability for fees by demonstrating that an informed judgment would have viewed its arguments as having a fair possibility of success.

Rather than conduct a detailed, de novo assessment of the strength of the government's argument on the merits, we believe that, whenever possible, a court should look to objective indicia of reasonableness to determine whether the government's position was "substantially justified." These objective indicia include lower court rulings accepting the government's position, or stays embodying a preliminary determination that the government's position had merit. Obviously, if the government was able to convince a judge that its position was sound, by definition that position must, in all but the most extraordinary cases, have had a fair hope of success. At the same time, reference to objective indicia to determine reasonableness avoids the necessity, in every case, of a second round of litigation that rehashes the merits in an attempt to grade the strength of the government's losing argument.

2. In the present case, this Court itself has provided a clear indication that the Secretary's position in the operating-subsidy litigation had merit: the full Court stayed the district court's adverse judgment while an appeal from that judgment was pending in the court of appeals. As a number of Justices have observed, the grant of such a stay presupposes that the moving party had a realistic chance of success on the merits. And if the government's position was strong enough to warrant issuance of a stay,

the government certainly was substantially justified in acting on that position. Indeed, the Court's decision to issue a stay was borne out, at least in part, by its subsequent grant of certiorari in two related operating-subsidy cases. In these circumstances, there was no need for the court of appeals to have conducted its own analysis of the strength of the government's underlying position.

To the extent that there is any doubt about this, an examination of the underlying merits of the operating-subsidy dispute confirms that the government's position was reasonable. The language of the statute creating the operating-subsidy program was reasonably read at the time to give the Secretary discretion in deciding whether the program should be implemented. That reading was seemingly confirmed by the existing caselaw. And because the Secretary concluded that Congress had not authorized her to commit sufficient funds to operate all of the housing subsidy programs that Congress had created, her decision not to commit the available funds to the operating-subsidy program was eminently reasonable.

B. If the Court concludes that the government was "substantially justified" in the operating-subsidy litigation, respondents are entitled to no fees at all, and there is no need to reach the second question presented in this case. If the Court does have occasion to reach that question, however, it is plain that the court of appeals committed significant errors in concluding that a fee award in excess of EAJA's $75-per-hour limit was justified.

In the absence of a "special factor," EAJA expressly restricts fee awards to $75 per hour; the statute lists only one such "special factor," the "limited availability of qualified attorneys for the proceedings involved." As the other courts of appeals

accordingly have concluded, $75 per hour generally must be substituted for the attorney's customary rate (when that rate exceeds $75 per hour) in setting the EAJA lodestar. In this case, however, the courts below treated as "special factors" not only the supposed paucity of qualified attorneys (as to which neither court made adequate findings), but also the difficulty of the legal issues, the undesirability of the case, the expertise of counsel, the results obtained, and customary rates.

If followed, this approach would render the EAJA fee cap nugatory. As this Court repeatedly has explained in litigation under other fee-shifting statutes, the factors cited by the court of appeals are presumed to be fully reflected in the lodestar, and therefore cannot justify an increase in the lodestar amount in any but the most extraordinary case. Indeed, the factors cited by the court of appeals are used in calculating fees ab initio under other fee-shifting statutes; if they are treated as "special factors" justifying a departure from EAJA's $75-per-hour limit, fees in EAJA cases will be calculated in a manner identical to their computation under other statutes. That could not have been Congress's intent in placing an express statutory fee cap in EAJA.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED EAJA

The court of appeals resolved two issues in deciding this case. As a threshold matter, it concluded that the government's position in the operating-subsidy litigation was not "substantially justified." Having thus held that respondents' counsel are entitled to fees under EAJA, the court of appeals proceeded to identify several factors—the paucity of qualified attorneys, the supposed difficulty and novelty of the legal issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the results obtained, and customary fees in similar lawsuits—that, in its view, justified a departure from EAJA's $75-per-hour fee cap.

Neither of these holdings is sound. The court of appeals' conclusion that the government was not justified in acting on its interpretation of the statute creating the operating-subsidy program disregarded contrary signals sent by this Court, and by other courts of appeals. And the second prong of the decision below is inconsistent both with the plain language of EAJA and with the decisions of this Court establishing general principles for calculating attorneys' fees. The reading of EAJA embraced by the court below will frustrate the statute's purposes and encourage duplicative litigation. The decision should be reversed.

I. THE GOVERNMENT'S POSITION IN THE OPERATING SUBSIDY LITIGATION WAS SUBSTANTIALLY JUSTIFIED WITHIN THE MEANING OF EAJA

A. The Government's Position Is "Substantially Justified" If It Is "Reasonable," That Is, If It Has Some Substance And A Fair Possibility Of Success

1. Congress enacted EAJA because it found that the prospect of having to pay high attorneys' fees was deterring individuals and small organizations "from seeking review of, and defending against, unreasonable governmental action." Pub. L. No. 94-481, § 202(a), 94 Stat. 2325. See S. Rep. 96-253, 96th Cong., 1st Sess. 1, 5-6 (1979); H.R. Rep. 96-1418, 96th Cong., 2d Sess. 5 (1980); H.R. Rep. 99-120, 99th Cong., 1st Sess. 4, 12 (1985). At the same

time, however, Congress did not want the prospect of liability for attorneys' fees to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities" (H.R. Rep. 99-120, *supra*, at 10), a consequence that might follow from a rule prescribing mandatory fee awards against the government whenever it lost a case. See H.R. Rep. 96-1418, *supra*, at 14; S. Rep. 96-253, *supra*, at 6. To serve both of these policies, Congress made the government liable for attorneys' fees incurred by persons who successfully oppose government action—but only when the government's administrative or litigating position was not "substantially justified." That standard was chosen as a "middle ground" (H.R. Rep. 96-1418, *supra*, at 14) that "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights" (*id.* at 10). See S. Rep. 96-253, *supra*, at 6; 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini).[4]

Congress made clear in EAJA's preamble that the statute was designed to encourage challenges only to "unreasonable governmental action" (Pub. L. No. 94-481, § 202(a), 94 Stat. 2325), and the legislative history repeatedly makes the same point.[5] It thus

[4] For similar reasons, Congress provided that fees should not be awarded when "special circumstances would make an award unjust"; Congress wanted to "insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." S. Rep. 96-253, *supra*, at 7. See H.R. Rep. 96-1418, *supra*, at 11.

[5] Both the committee reports and the floor debate explain that EAJA is aimed at "unreasonable" actions by the government. See H.R. Rep. 96-1418, *supra*, at 5; S. Rep. 96-253, *supra*, at 1; 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini); *id.* at 21436 (remarks of Sen. Culver); *ibid.* (remarks of Sen. Stevens); *id.* at 21439 (remarks of Sen. Ford); *id.* at 21441 (remarks of Sen. Thurmond); *id.* at 21442 (remarks of Sen. Helms); *id.* at 21443 (remarks of Sen. Bayh); *id.* at 21444 (remarks of Sen. Kennedy); 126 Cong. Rec. 27682 (1980) (remarks of Sen. DeConcini); *id.* at 28106 (remarks of Sen. Thurmond). See also 125 Cong. Rec. 21436 (remarks of Sen. Dole) ("careless, arbitrary, and irresponsible" government action); *ibid.* (remarks of Sen. Domenici) ("arbitrary and irrational" government action).

follows logically that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 22 (1980). See S. Rep. 96-253, *supra*, at 6; H.R. Rep. 96-1418, *supra*, at 10, 13, 14; 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini); 126 Cong. Rec. 28104 (1980) (remarks of Sen DeConcini).[6] While the "reasonableness" of the government's position obviously must be assessed on a case-by-case basis (see H.R. Rep. 99-120, *supra*, at 10), Congress emphasized that EAJA "should not be read to raise the presumption that the Government position was not sub-

[6] The phrase "substantial justification" was borrowed from Fed. R. Civ. P. 37, which makes a party who resists discovery liable for the other party's discovery expenses, unless the resistance was "substantially justified." Fed. R. Civ. P. 37(a)(4) and (b)(2); see H.R. Rep. 96-1418, *supra*, at 13; 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini). Decisions under Rule 37 make it clear that a party lacks substantial justification only when its position is wholly without merit—for example, when it "willfully def[ies] a court order." *Coca-Cola Bottling Co.* v. *Coca-Cola Co.*, 110 F.R.D. 363, 373 (D. Del. 1986). See *Scott Paper Co.* v. *Ceilcote Co.*, 103 F.R.D. 591, 598 (D. Me. 1984); *Brown* v. *U.S. Elevator Corp.*, 102 F.R.D. 526, 531 (D.D.C. 1984).

stantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." S. Rep. 96-253, *supra*, at 7; H.R. Rep. 96-1418, *supra*, at 11. See 125 Cong. Rec. 21444-21445 (1979) (remarks of Sen. Kennedy); 131 Cong. Rec. S9993 (daily ed. July 24, 1985) (remarks of Sen. Grassley). Instead, the government must show only that an informed judgment would have viewed its arguments as having some substance and a fair possibility of success.

2. The original EAJA, which was enacted in 1981, expired by its terms on October 1, 1984. Pub. L. No. 94-481, § 204(c), 94 Stat. 2329. Congress subsequently reenacted EAJA as of August 5, 1985. Pub. L. 99-80, § 6(a), 99 Stat. 186.[7] While the reenactment left unchanged the statutory language authorizing an award of fees in the absence of substantial justification (see Pub. L. No. 99-80, § 2(a), 99 Stat. 184), the accompanying House report stated that the test for substantial justification "must be more than mere reasonableness." H.R. Rep. 99-120, 99th Cong., 1st Sess. 9 (1985). Despite this statement, we think it clear that the 1985 reenactment, which did not alter the text of EAJA in any relevant way, should not be read to modify the "reasonableness" test for substantial justification that had been applied by 11 courts of appeals (including the court

[7] At least eight courts of appeals have held that the 1985 legislation governs cases, like this one, that were pending on the date of EAJA's enactment (see *Center for Science in the Public Interest* v. *Regan*, 802 F.2d 518, 521-522 (D.C. Cir. 1986) (citing cases)). We do not dispute that the terms of the 1985 legislation are controlling in this case.

below) prior to 1985. See *United States* v. *Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985) (citing cases).[8]

As we have explained, the text and history of the 1980 legislation leave no doubt that the Congress that drafted the "substantial justification" standard intended to make fees available only when the government's position was "unreasonable." Congress described the 1985 reenactment of EAJA as a "revival of certain expired provisions," and stated that EAJA's provisions should thenceforth be effective "as if they had not been repealed." Pub. L. No. 99-80, § 6(a), 99 Stat. 186. Although Congress in 1985 expressly amended a few sections of the original Act, it gave no indication—even in the House report (see H.R. Rep. 99-120, *supra*, at 4, 8)—that it intended to change the meaning of statutory language that had been reenacted in unaltered form. Thus, as then-Judge Scalia has noted, the 1985 House report did nothing more than "comment[] upon language drafted in an earlier Congress, and reenacted, *unamended* as far as is relevant to the present point, in the 1985 law." *Hirschey* v. *FERC*, 777 F.2d 1, 8 (D.C. Cir. 1985) (Scalia, J., concurring) (emphasis in original).

Under these circumstances, the 1985 House report cannot be given dispositive weight. See generally *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 822-824 (1980). Indeed, there are special reasons to be skeptical about the House report, since sponsors of the EAJA reenactment, both in the Senate and in the

[8] The only court of appeals to apply a semantically different test before 1985 was the District of Columbia Circuit, which required the government to demonstrate that its position was "slightly more" than reasonable. *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983), cert. denied, 466 U.S. 936 (1984).

House, took the extraordinary step of renouncing portions of that report on the floor. See 131 Cong. Rec. S9993 (daily ed. July 24, 1985) (remarks of Sen. Grassley); *id.* at 16917 (remarks of Rep. Kindness); *ibid.* (remarks of Rep. Moorhead). Cf. *id.* at 16917-16918 (remarks of Rep. Kastenmeier). See generally *Rose* v. *FEC*, 806 F.2d 1081, 1089-1090 (D.C. Cir. 1986). Despite the statement in the House report, therefore, there is little reason to believe that Congress intended to alter the settled meaning of the "substantially justified" standard through "reenactment of the same language unchanged" (*Hirschey*, 777 F.2d at 8 (Scalia, J., concurring) (emphasis omitted)).[9]

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[9] Several courts of appeals accordingly have held that the governing standard remains one of "reasonableness," explaining that the 1985 legislative history is "conflicting and inconclusive." *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1288-1289 (5th Cir. 1985). See *Phil Smidt & Son, Inc.* v. *NLRB*, 810 F.2d 638, 642 n.5 (7th Cir. 1987); *Pullen* v. *Bowen*, 820 F.2d 105 (4th Cir. 1987). Several other courts have continued to apply the "reasonableness" standard without discussion of the 1985 legislative history. See *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986); *Fulton* v. *Heckler*, 784 F.2d 348, 349 (10th Cir. 1986); *Yoffe*, 775 F.2d at 449. Cf. *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986), vacated in part on other grounds, 804 F.2d 1573 (leaving it unclear whether the standard is one of "reasonableness" or "more than mere reasonableness"). And compare *Herring* v. *United States*, 781 F.2d 119, 121 (8th Cir. 1986) (reasonableness standard) with *United States* v. *1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986) (appearing to adopt standard of "clearly" reasonable). Other courts, however, have read the 1985 legislative history—in our view incorrectly—as changing the applicable standard. See *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (en banc) (emphasis in original) (government must show "that it was *clearly* reasonable"); *Riddle* v. *Secretary of HHS*, 817 F.2d 1238, 1244 (6th Cir. 1987) ("the government's position must have *more* than a reasonable basis"), reh'g en banc granted No. 86-5228 (6th Cir. July 9, 1987); *Pullen* v. *Bowen*, 820 F.2d 105 (4th Cir. 1987). The District of Columbia Circuit has adhered to its prior view that the government's position must be "slightly more than reasonable," although it has expressed skepticism that there is any meaningful distinction between its standard and one of simple reasonableness (*Battles Farm Co.*, 806 F.2d at 1101-1102 n.11).

In any event, even if the House report is given credence, it is difficult to see any but a semantic distinction between tests that look to "reasonableness" and "more than reasonableness." On the one hand, the government plainly is liable for fees when it acts in an irrational or arbitrary way; on the other hand, the government is not liable for fees if it prevails in the lawsuit. There simply is not enough room between these poles for subtle distinctions between "reasonable," "more than reasonable," "slightly more than reasonable," and "clearly reasonable" (see note 9, *supra*) to make much of a difference in the outcome of any particuar case. This is especially so given the difficulty and subjectivity of any assessment of "the initial risk of loss [that is made] when the case is over" (*Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (June 26, 1987) (*Delaware Valley II*), slip op. 10-11; cf. *id.* at 2 (opinion of O'Connor, J.)). No matter how the substantial justification standard is articulated, then, it must be deemed satisfied if the government's position had some substance and if the government's arguments could have been made with a fair possibility of sucess.

B. The Government's Position In The Operating-Subsidy Litigation Was "Reasonable"

1. In determining the reasonableness of the government's position, courts typically have undertaken a detailed, de novo assessment of the strength of the government's argument on the merits. In some cases, of course, this sort of return to first principles is made unavoidable by the nature of the EAJA standard, which eschews automatic fee-shifting. In our view, however, it is preferable, where possible, to determine liability for fees under EAJA by looking to objective indicia of reasonableness—indicia such as lower court rulings or dissenting opinions accepting the government's position, or the grant of stays or preliminary injunctions embodying a preliminary determination that the government's position had merit. This approach to resolving claims under EAJA, which generally would end the inquiry upon a showing that a neutral judge had found the government's position to have merit, accords most fully with the Act's purposes.

Most obviously, if the government was able to convince a judge that its position had merit, by definition that position must, in all but the most extraordinary cases, be deemed at least presumptively "reasonable." If the government prevailed in some courts or in the preliminary stages of a case, its argument plainly must have had some substance—and plausibly could have been made with some hope of success—even if that argument ultimately was rejected by the weight of authority. Indeed, a contrary conclusion would put government lawyers in a quandary: in determining whether a given action exposed the government to liability for attorneys' fees, they would be unable to rely on past successes as settling the reasonableness of the government's position. Such a result inevitably would deter the government "from vigorously fulfilling its proper constitutional enforcement obligations." 125 Cong. Rec. 21435 (1979) (remarks of Sen. DeConcini).

At the same time, reference to objective indicia of reasonableness avoids the necessity, in every case, of a second round of litigation that rehashes the merits in an attempt to grade the strength of the government's losing argument. This Court has repeatedly attempted to discourage labor-intensive litigation over attorneys' fees, explaining that such litigation "should be simplified to the maximum extent possible" (*Delaware Valley II*, slip op. 10). See *Webb* v. *County Board of Education*, 471 U.S. 234, 244 n.20 (1985); *Blum* v. *Stenson*, 465 U.S. 886, 902 n.19 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Yet unless prior, favorable judicial assessments of the government's case can serve as a shorthand indication that its position was reasonable, every EAJA lawsuit will provide an opportunity for litigation not only about the usual incidents of an attorneys' fee dispute (such as the proper hourly rate), but also about whether the government could reasonably have believed at the outset that it might have won a case that it in fact lost. This surely must be "one of the least socially productive types of litigation imaginable." *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part).

Duplicative litigation over attorneys' fees is more than simply wasteful; it also threatens to defeat EAJA's purposes. The prospect of lengthy and unpredictable litigation about the availability of fees may make it impossible for persons interested in contesting government action to gauge the likelihood of a fee recovery. That uncertainty, and the expense

associated with resolving it, may discourage challenges to unjustified government action. See *Hensley*, 461 U.S. at 455-456 (Brennan, J., concurring in part and dissenting in part).

2. In the present case, this Court itself has provided a clear, objective indication that the Secretary's position in the "operating subsidy" litigation had merit: the full Court stayed the district court's adverse judgment while an appeal from that judgment was pending in the court of appeals. 429 U.S. 892 (1976). As Justice Brennan has observed, the Court's grant of such a stay generally presupposes that "there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). See *Bellotti* v. *Latino Political Action Committee*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers); *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers); *In re Roche*, 448 U.S. 1312, 1314 (1980) (Brennan, J., in chambers); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 690 (6th ed. 1986) (stay applicant must demonstrate a "reasonable probability of prevailing on the merits"). And this approach to stay applications is not new, as respondents have contended (see Br. in Opp. 24-27). To the contrary, the Court has long indicated that a stay will be granted only when the issuing Justice believes that there is "a significant possibility of reversal of the lower court's decision." *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers). See *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1305 (1976) (Rehnquist, J., in chambers); *Republican State Central Committee* v. *Ripon Society*, 409 U.S. 1222, 1225 (1972) (Rehnquist, J., in chambers); R. Stern & E. Gressman,

Supreme Court Practice 871-872, 874-875 (5th ed. 1978). Cf. *Whalen* v. *Roe*, 423 U.S. 1313, 1316-1317 (1975) (Marshall, J., in chambers).

Indeed, Members of the Court have often noted that another, closely related prerequisite to the issuance of a stay—the requirement that the applicant demonstrate a " 'reasonable probability' " that four Justices will vote to grant certiorari (*Wise* v. *Lipscomb*, 434 U.S. 1329, 1333-1334 (1977) (Powell, J., in chambers) (citation omitted))—involves a determination that the issue presented is " 'sufficiently meritorious' " (*ibid.*) or "sufficiently debatable" (*Edwards* v. *New York*, 76 S. Ct. 1058, 1059 (1956) (Harlan, J., in chambers) to interest the Court. See *Board of School Commissioners* v. *Davis*, 84 S. Ct. 10, 11 (1963) (Black, J., in chambers); *Appalachian Power Co.* v. *American Institute of CPA*, 80 S. Ct. 16, 18 (1959) (Brennan, J., in chambers). At least to some extent, this " 'four-vote' rule reflects the policy in favor of granting a stay only when the losing party presents substantial contentions which are likely to prevail on the merits" (*Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1311 (1973) (Marshall, J., in chambers). As Justice Brennan has put it, "the consideration of prospects for reversal dovetails * * * with the prediction that four Justices will vote to hear the case" (*In re Roche*, 448 U.S. at 1314 n.1). See R. Stern, E. Gressman & S. Shapiro, *supra*, at 694-695.

This Court's conclusion that the Secretary was entitled to a stay in the case, coupled with the Second Circuit's conclusion to the same effect several months later in the *Dubose* case,[10] should be dispositive of

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[10] "In [the Second] Circuit, in addition to considering the harm to the parties and the public interest, a court must find

respondents' request for attorneys' fees. The grant of those stays plainly involved a conclusion that there was "a significant possibility of reversal of the lower court decision" (*Times-Picayune Pub. Corp.*, 419 U.S. at 1305 (Powell, J., in chambers)). The bulk of the legal discussion in the government's stay application to this Court was in fact devoted to a demonstration that the Secretary was likely to prevail on appeal (see Stay Application No. A-259, at 9-11 (1976 Term)).[11] And if the government's position was

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that the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success.'" *Dubose* v. *Pierce*, 761 F.2d at 920 (citations omitted). The Second Circuit in *Dubose* "f[ound] it unlikely that these criteria were overlooked by [it] simply because the Supreme Court had already acted," and it accordingly saw "both stays as indicative of the courts' view that the government's position was not unreasonable" (*ibid.*).

[11] The significance of the *Underwood* stay was widely recognized at the time that it was granted. See *Cottonwood Park Tenants Ass'n* v. *HUD*, No. 77-2059 (D. Kan. May 7, 1977), slip op. 11 ("In our view the Supreme Court's granting of the stay can mean little else but that there may be grave doubt as to the correctness of the holding in *Underwood*"); *Haas* v. *Howard*, 579 F.2d 654, 658 (1st Cir. 1978) (citation omitted) (" 'the message implicit in the Supreme Court's stay of judgment in *Underwood* * * * [is] that court-ordered payment of operating subsidies should be halted until the Secretary's duty under the law is clarified' "); *Taunton Gardens Co.* v. *Hills*, 557 F.2d 877, 878 (1st Cir. 1977) ("we would be surprised if HUD's counsel were not moving to vacate the injunctions now in effect [around the country]"). Indeed, while it later reversed its position (see 579 F. Supp. 937, 950 (D. Conn. 1984)), the district court in *Dubose* recognized at the time that "the stays issued by the Supreme Court in *Underwood* * * * and by the Second Circuit in *Dubose* * * * cast doubt upon my earlier pronouncement that 'the plaintiffs will almost surely succeed in obtaining permanent injunctive relief'" (*Dubose* v. *Pierce*, 82 F.R.D. 582, 585 (D. Conn. 1979)).

strong enough to convince this Court to stay an adverse district court judgment pending appeal to the court of appeals—a form of relief not often granted (see R. Stern, E. Gressman & S. Shapiro, *supra*, at 678-679)—the government certainly was "substantially justified" in acting on that position. Indeed, it is clear that the showing that must be made to obtain a stay *exceeds* that which must be made to establish "substantial justification" within the meaning of EAJA. Compare R. Stern, E. Gressman & S. Shapiro, *supra*, at 690 (applicant must establish a "reasonable probability of prevailing" in order to secure a stay) with S. Rep. 96-253, *supra*, at 7 (government need not establish "a substantial probability of prevailing" in order to be "substantially justified" under EAJA); H.R. Rep. 96-1418, *supra*, at 11 (same).

This Court's action in granting a stay thus necessarily embodied a conclusion that the government had a realistic hope of success in making its arguments. And the Court's decision to issue a stay was borne out, at least in part, by its subsequent grant of certiorari in two related operating subsidy cases. *Harris* v. *Ross*, 431 U.S. 928 (1977); *Harris* v. *Abrams*, 431 U.S. 928 (1977). In the absence of a conflict in the circuits, it is unlikely that the Court would have granted the government's petitions in those cases had the Secretary's argument been viewed as wholly without merit.[12] These objective indicia of the "reason-

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[12] The court of appeals (Pet. App. 9a) refused to accord any weight to this Court's grant of a stay and of writs of certiorari, for two reasons. First, it surmised that this Court "may have granted certiorari to consider the broad question of the executive's power to impound funds, rather than the narrow issue of the meaning of 12 U.S.C. § 1715z-1." Second, the court of appeals suggested that this Court "may have acted

ableness" of the government's position were sufficient to dispose of respondents' fee request, and there was no need for the court of appeals to have conducted a de novo investigation into the strength of the government's underlying position.[13]

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in sympathy with the low-income tenants who were forced to bring numerous successive actions to enforce their rights." This Court, however, plainly did not grant certiorari in the operating-subsidy cases to consider impoundment issues. The question presented in the government's petitions—"[w]hether 12 U.S.C. (Supp. V) 1715z-1(f)(3) required the Secretary of Housing and Urban Development to establish an operating subsidy program" (No. 76-1234 Pet. 2)—involved a simple question of statutory construction, and the entire discussion in the petitions (see *id.* at 7-12) was devoted to a demonstration that the Secretary's interpretation of the statute was correct. As for the court of appeals' second rationale, it is hardly likely that this Court stayed a judgment running in favor of low-income tenants and granted certiorari in two cases in which they had been successful out of "sympathy" with the tenants' position.

[13] In ruling against the government, the court below evidently found it most significant that, in its view of the merits, "the Secretary had no reasonable basis in law to ignore the mandates of section 1715z-1" (Pet. App. 9a). But the court also pointed to two "objective" criteria allegedly supportive of its conclusion: the fact that the Secretary ultimately settled the case on terms favorable to respondents (*ibid.*), and the fact that the Secretary had continued to litigate the operating-subsidy issue even though a number of district courts had rejected her reading of the statute (*id.* at 8a-9a). The government's decision to settle a case, however, sheds no light on whether its position was substantially justified. As the Second Circuit in *Dubose* explained, "policy reasons quite apart from the merits of the dispute may, in the last analysis, dictate a premature termination of the litigation" (761 F.2d at 920). Particularly is that so where, as here, the litigation is settled by officials of a newly-elected Administration. Cf. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual*

3. Even if it be thought necessary to examine the underlying merits of the operating-subsidy dispute, it is clear that the government's position was reasonable as an initial matter. Examination of the merits thus serves to confirm what this Court's grant of a stay and certiorari implied—that the government's position was "substantially justified."

The housing statute at issue in this case, 12 U.S.C. (1970 ed. & Supp. IV 1974) 1715z-1, provided in relevant part for three subsidy programs: a "deep subsidy" program, an "interest reduction" program, and the operating-subsidy program. The statutory provision creating the first of these programs, which provided that the Secretary "*shall* make, and contract to make," deep-subsidy payments, was written in unmistakably mandatory terms. 12 U.S.C. (Supp. IV 1974) 1715z-1(f)(2) (emphasis added). In con-

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Automobile Insurance Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). Indeed, "[a] holding that an agency's decision to settle an appeal on terms favorable to the claimant undercuts the agency's justification of its litigation position would discourage future settlements, a factor [courts] should not lightly disregard" (*Dubose*, 761 F.2d at 920). See *Battles Farm Co.*, 806 F.2d at 1103. The district court decisions cited by the court below, of course, would be entitled to some weight if they stood alone. But those decisions cannot overcome the import of this Court's and the Second Circuit's grant of a stay. Where the judicial authority points in both directions—where the government's position has been found to have merit by some courts but not by others—that position must be deemed "substantially justified," because it necessarily had some plausibility and could have been advanced with a fair possibility of success.

trast, the statutory language creating the two other programs was permissive, declaring that the Secretary is "*authorized* to make, and contract to make," operating-subsidy and interest-reduction payments. 12 U.S.C. (Supp. IV 1974) 1715z-1(f)(3) (emphasis added); 12 U.S.C. (1970 ed.) 1715z-1(a) (emphasis added). See also S. Rep. 93-693, 93d Cong., 2d Sess. 32 (1974). This difference in the language used to create the three companion programs led the Secretary to conclude that she had discretion to decline to implement the operating-subsidy program if that course would advance national housing objectives.

The Secretary's conclusion drew compelling support from a then-recent decision of the District of Columbia Circuit, *Pennsylvania* v. *Lynn*, 501 F.2d 848 (1974). In an opinion by Judge McGowan, the *Lynn* court held that the Secretary could suspend the interest-reduction program—which had been created in 1968 with language identical to that used to establish the operating-subsidy program in 1974—when she concluded that its implementation would interfere with other housing goals. While the court of appeals did not find the permissive language of Section 1715z-1(a) entirely dispositive, the court noted that "there is no warrant on the face of the authorizing subsections for decrying an intent that the Secretary's authority [to operate the program] be used under all circumstances" (501 F.2d at 854). And the court concluded that the "most basic statement of congressional housing policy"—that derived from the Housing Act of 1949, 42 U.S.C. 1441—empowers the Secretary " 'to choose between alternative methods of achieving the national housing objectives' " (*Lynn*, 501 F.2d at 854, 855 (citation omitted)).

Following Congress's enactment of the 1974 Housing Act Amendments, the Secretary concluded that Congress had not authorized her to commit funds sufficient to operate all three subsidy programs (see Stay Application No. A-259, Apps. F, G (1976 Term); 76-1234 Gov't Br. at 10-19). The Secretary accordingly decided to honor her mandatory commitments under the deep-subsidy program, as well as certain pre-existing commitments under the interest-reduction program, and declined to implement the operating-subsidy program (see *id.* at 11 & n.10). Given the language of the statute and the existing case law, this decision to use the limited available resources in the most effective manner was plainly reasonable. And it is easy to see why consideration of this background led the Court to issue its stay. In these circumstances, there is little doubt that the Secretary was "substantially justified" in asserting and acting on her position—and that attorneys' fees accordingly are not available to respondents under EAJA.

II. THE COURTS BELOW ERRED IN AWARDING FEES AT RATES EXCEEDING $75 PER HOUR

If the Court concludes that the government was "substantially justified" in the operating-subsidy litigation, respondents plainly are entitled to no fees at all, and there is no need for the Court to reach the second question presented in this case. If the Court does reach that question, however, the court of appeals' disposition of it should be reversed. That court committed significant errors in its analysis of the circumstances in which a departure from EAJA's $75-per-hour limit is permissible.

1. EAJA provides that "attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. (Supp. III) 2412(d)(2)(A)(ii). Congress did not expressly identify, either in the Act itself or in the legislative history, the universe of "special factors" that might justify fee awards in excess of the statutory limit. See H.R. Rep. 96-1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. 96-253, 96th Cong., 1st Sess. 16 (1979); H.R. Rep. 96-1005, 96th Cong., 2d Sess. Pt. 1, at 11 (1980); 125 Cong. Rec. 21444 (1979) (remarks of Sen. Kennedy). See generally *Aston* v. *Secretary of HHS*, 808 F.2d 9, 11 & n.1 (2d Cir. 1986). Congress certainly understood, however, that $75 per hour—the figure chosen as the statutory standard—is lower than the usual rate charged by many attorneys, and that awarding fees at the $75 rate "would prevent a party from engaging * * * an expensive law firm and being able entirely to cover all the expenses that might be charged." *Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980) (statement of Rep. Kastenmeier).

Although the legislative history on this issue is sparse, therefore, one point emerges quite clearly from it. While Congress understood that attorneys' fees would be calculated on the basis of prevailing market rates, it stipulated that those fees generally are "subject to a maximum rate of $75 per hour." 125 Cong. Rec. 21444 (1979) (remarks of Sen Kennedy); see 126 Cong. Rec. 28647 (1980) (remarks

of Rep. Kastenmeier). Indeed, the congressional mandate that fees exceed $75 per hour only when "special" circumstances are present indicates that only in rare cases are higher fees justified. Cf. 28 U.S.C. (Supp. III) 2412(d)(1)(A) (barring an award of attorneys' fees, even if the government's position is not "substantially justified," where "special circumstances make an award unjust").

In light of this congressional intent, the courts of appeals, with the exception of the court below, have recognized that "[t]he $75 statutory rate is a ceiling and not a floor." *Chipman* v. *Secretary of HHS*, 781 F.2d 545, 547 (6th Cir. 1986). The courts accordingly have held that, in EAJA, Congress " 'expressed clearly its intention that prevailing market rates are relevant only up to $75 per hour,' " so that " 'customary rates above $75 per hour cannot support a claim in excess of the statutory maximum rate.' " *Ibid.* (citation omitted). As a result, $75 per hour must be substituted for the attorney's customary rate (when that customary rate exceeds $75 per hour) in computing the EAJA lodestar. See *ibid.*; *Action on Smoking and Health* v. *CAB (ASH)*, 724 F.2d 211, 219-220, 222, 223 (D.C. Cir. 1984). Cf. *Vibra-Tech Engineers, Inc.* v. *United States*, 787 F.2d 1416, 1420 (10th Cir. 1986).[14]

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[14] Several courts have suggested that an increase to the lodestar for exceptional representation may be permissible in extraordinary EAJA cases. But they have emphasized that "[a] court * * * is not to take into account the measure of skill normally expected of a lawyer charging $75 per hour, but rather the measure of skill expected of a lawyer commanding *this* lawyer's reasonable hourly fee." *ASH*, 724 F.2d at 219 (emphasis in original). Accord, *Vibra-Tech Engineers*, 787 F.2d at 1420. This approach plainly is compelled by the statute: a contrary analysis would permit anyone who re-

The statute itself lists only one "special factor" that justifies a departure from EAJA's $75-per-hour fee cap—the "limited availability of qualified attorneys for the proceedings involved" (28 U.S.C. (Supp. III) 2412(d)(2)(A)(ii)). Noting Congress's intention to restrict fee awards, the courts have generally held that this factor comes into play only in the "unusual situation where appropriately specialized legal services cannot be obtained in the market for $75 [an hour] or less." *Vibra-Tech Engineers*, 787 F.2d at 1420. Accord, *ASH*, 724 F.2d at 217. See H.R. Rep. 96-1418, *supra*, at 15 (fee award in excess of $75 per hour permissible when there is "a limited availability of qualified attorneys with expertise in the particular proceedings involved"). A determination that such a situation exists requires suitably detailed factual findings about the actual availability of qualified attorneys, not generalized statements about the supposed difficulty of the case. See generally *Aston*, 808 F.2d at 11; *Chipman*, 781 F.2d at 547. Cf. *Delaware Valley II*, slip op. 16 (plurality opinion); *Pennsylvania* v. *Delaware Valley Citizens' Council*, No. 85-5 (July 2, 1986) (*Delaware Valley I*), slip op. 20. Thus, a fee award in excess of $75 per hour is not appropriate where the attorney's particular expertise, while useful in conducting the suit, was not "necessarily require[d]" for the prosecution of the litigation. *ASH*, 724 F.2d at 218. Any other approach would permit routine departures from the statutory cap whenever the attorney could be characterized as experienced or the case could be characterized as complex.

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tained a high-priced lawyer to obtain fees in excess of the statutory cap as a matter of course.

2. The decision below cannot be squared with these principles. In choosing to exceed the $75-per-hour cap, the court below listed as "special factors" not only the supposed paucity of attorneys possessing the necessary litigation skills (Pet. App. 11a), but also "the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases" (*id.* at 12a). By this analysis, the court evidently meant to label as EAJA "special factors" all of the considerations listed in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). That previous Ninth Circuit decision, in turn, had simply adopted (526 F.2d at 69-70) the 12 factors for calculating an attorney's fee that are set out in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See generally *Delaware Valley I*, slip op. 14-15 & n.7.

This reasoning cannot be reconciled with the language and plain meaning of EAJA. While baldly asserting that few attorneys possessed the skills necessary to handle this case successfully (see Pet. App. 11a, 15a), neither court below made a specific finding that "appropriately specialized legal services" could not "be obtained in the market for $75 [per hour] or less" (*Vibra-Tech Engineers*, 787 F.2d at 1420). On the record here, moreover, such a finding plainly could not have been made: respondents' counsel undertook the representation in this case several years before EAJA was enacted (at which time they could have had *no* expectation of a fee award), and they expressly disavowed any intent to obtain a fee

from the settlement fund (see Pet. App. 7a, 35a).[15] The courts below likewise erred in concluding that EAJA fees in excess of $75 per hour could be "based on the prevailing market rates * * * and on the individual attorney's expertise." Pet. App. 6a; see *id.* at 11a-12a, 17a. That conclusion flatly conflicts with

[15] It is obvious, moreover, that special skill was not needed to conduct the litigation here. This case was one of 17 operating-subsidy suits brought against the Secretary across the country; plaintiffs eventually were successful in all 17 (see Pet. App. 23a n.1). Thus, the district court in *Dubose*, while finding a fee award appropriate, declined to award a fee in excess of $75 per hour, stating that the operating-subsidy litigation "presented a relatively simple question" and that "[b]ecause an unusually high degree of legal talent was not required in this case, there was no dearth of lawyers who could have achieved similar results." *Dubose* v. *Pierce*, 579 F. Supp. 937, 953 (D. Conn. 1984), rev'd on other grounds, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516. Indeed, plaintiffs had prevailed against the Secretary at least preliminarily in nine operating-subsidy suits when the instant action was filed (see Pet. App. 33a n.11), and this suit was resolved in district court in less than three months, without trial and with minimal discovery, on the basis of arguments that already had been briefed elsewhere. The district court here also pointed to the settlement activities of respondents' counsel (see Pet. App. 15a) in concluding that there were few attorneys who could have handled this case. The administration of even a complex settlement, however, does not call for specialized counsel, and respondents' counsel in any event were not particularly specialized—they spent time learning how to publicize the settlement and draft routine billing requests, time for which they were compensated. See C.A. Record Excerpts 377-548. And if there were any unusual difficulties posed by the settlement administration here, those difficulties would have been reflected in the number of hours that went into the lodestar. See *Delaware Valley II*, slip op. 18 (plurality opinion); *id.* at 4 (opinion of O'Connor, J.).

Congress's understanding that EAJA fees would be "based on the prevailing market rate, *subject to a maximum rate of $75 per hour.*" 125 Cong. Rec. 21444 (1979) (remarks of Sen. Kennedy) (emphasis added and original quotation marks omitted). See *Chipman*, 781 F.2d at 547.

Indeed, the court of appeals' approach would render EAJA's $75-per-hour cap entirely nugatory. The 12 factors set out in *Kerr* and *Johnson* are considerations that have been taken into account by the courts in computing a reasonable fee under statutes that do not contain statutory caps, as an alternative to the lodestar approach. See *Kerr*, 526 F.2d at 70; see generally *Delaware Valley I*, slip op. 14. As this Court has explained, many of these factors—including, among those mentioned by the court below, the novelty and complexity of the issues, the skill and experience of counsel, the quality of representation, and the results obtained—"are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award" in any but the most extraordinary case (*id.* at 17). See *Delaware Valley II*, slip op. 16 (plurality opinion); *id.* at 4 (O'Connor, J., concurring); *Blum* v. *Stenson*, 465 U.S. 886, 901 (1984). And if the factors cited by the court of appeals cannot justify increasing the lodestar amount, they cannot justify departing from the $75-per-hour rate on which the EAJA lodestar must be based.[16]

[16] The court of appeals also cited "the contingent nature of the fee" as a "special factor" warranting a departure from EAJA's fee cap (Pet. App. 11a-12a). Given the unusual nature of EAJA's "substantially justified" standard, however, we do not believe that a plaintiff's risk of losing the suit is a consideration that justifies an EAJA fee increase, whatever

When computing fees under EAJA, therefore, factors such as the quality of representation, the com-

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the relevance of that factor under other fee-shifting statutes. If such a contingency adjustment is viewed as compensating the attorney for risks peculiar to the suit (see generally *Delaware Valley II*, slip op. 2 (opinion of O'Connor, J.)) it is entirely out of place in EAJA litigation, where fees may be awarded only when the government's position is unreasonable; in such a case, the plaintiff's risk of loss can hardly have been high. Cf. *Hirschey* v. *FERC*, 777 F.2d 1, 4-5 (D.C. Cir. 1985). In the instant case, for example, the court of appeals concluded that the government's position was not "substantially justified" because the Secretary assertedly "had no reasonable basis in law" for failing to implement the operating-subsidy program and that the government's lack of success in various district courts put the Secretary "on clear notice that his position was without legal basis" (Pet. App. 9a). While we disagree with these characterizations of the Secretary's position, they obviously were essential to the court of appeals' holding that the government was liable for fees. And if it was clear from the outset that the Secretary's position was without merit, respondents' attorneys did not risk much in undertaking the representation here.

An adjustment for contingency may also be viewed as compensating a plaintiff's attorney for the "difference in market treatment of contingent fee cases *as a class*" (*Delaware Valley II*, slip op. 1 (O'Connor, J., concurring) (emphasis in original); see *id.* at 12-13 (Blackmun, J., dissenting)). If so, however, the contingency adjustment must be viewed as part of the prevailing market rate for contingent-fee cases (cf. *id.* at 3 (Blackmun, J., dissenting)), and EAJA's cap was expressly intended to make the market rate relevant only up to $75 per hour. See 125 Cong. Rec. 21444 (1979) (remarks of Sen. Kennedy). An adjustment that is a component of every contingent fee, moreover, cannot easily be characterized as a "special factor" (28 U.S.C. (Supp. III) 2412(d)(2)(A)(ii)) justifying a departure from the specified $75-per-hour rate. In any event, while both courts below increased the fee to compensate for contingency (Pet. App. 11a-12a, 17a), neither court supported this enhancement by making "any findings of fact

plexity of the case, and the experience of counsel must be deemed subsumed within a lodestar calculated on the basis of the $75 rate specified by the statute. See *Chipman*, 781 F.2d at 547.[17] As a result, a highly experienced (or simply high-priced) attorney may not receive his usual fee under EAJA. But that is a necessary consequence of EAJA's "explicit statutory fee cap." *ASH*, 724 F.2d at 217. If, instead, each of the *Kerr* and *Johnson* factors—which are, after all, used in calculating fees ab initio under other fee-shifting statutes—is treated as a "special factor" for EAJA purposes, attorneys compensated under EAJA will *always* receive more than $75 per hour, so long as they would have received more than $75 per hour had they been compensated under another statute.[18] Indeed, if such an approach is taken, fees will be calculated under EAJA in a manner *identical* to their computation under fee-shifting statutes that do not

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concerning the degree to which contingency is compensated in the relevant market" (*Delaware Valley II*, slip op. 4 (opinion of O'Connor, J.)). In this circumstances, the contingency adjustment plainly was improper.

[17] The court of appeals in *ASH* suggested that the EAJA lodestar could be modified to reflect contingency, quality of representation, and exceptional results—factors that it previously had held could be used to modify the lodestar under other fee-shifting statutes. 724 F.2d at 218-219 (citing *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc)). The *ASH* decision, however, predated this Court's holdings in *Delaware Valley II*, *Delaware Valley I*, and *Blum* v. *Stenson*, 465 U.S. 886 (1984), which indicated that those factors generally are subsumed within the lodestar.

[18] Of course, the *Kerr* factors may be employed in computing an EAJA fee up to the statutory cap of $75 per hour. See *Florida Suncoast Villas, Inc.* v. *United States*, 776 F.2d 974, 976 (11th Cir. 1985).

have an express statutory cap. Congress plainly had no such result in mind when it explicitly limited EAJA attorneys' fees to a maximum rate of $75 per hour, and the court below had no warrant to expand that precise waiver of the government's sovereign immunity beyond its plain terms. See generally *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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NO. 86-1512

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL R. PIERCE, JR., Secretary of Housing and Urban Development, Petitioner

vs.

MYRNA UNDERWOOD, et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Secretary of Housing and Urban Development (HUD), having lost in nine different courts on the same issue, argues that he was "substantially justified" in litigating and losing the tenth case. Therefore, he contends, the trial court which had lived with this case for several years and the Court of Appeals were incorrect in awarding attorneys' fees under the Equal Access to Justice Act (EAJA), which mandates fees to parties who prevail against the federal government unless the government can prove that its position was substantially justified.

The Secretary contends that notwithstanding his repeated losses, his position must have had some substance, and was therefore substantially justified, because this Court in 1976 issued a stay without opinion in this case and granted certiorari in two related cases.

Accordingly, the Secretary urges, the award of attorneys' fees below was erroneous.

Both the Secretary's analysis of EAJA and his view of this case are incorrect. Congress, in enacting EAJA, expressly rejected government arguments about the standard of proof identical to those made by the Secretary in this case, and required the United States to make a strong showing of justification in order to avoid an award of attorneys' fees.

The Secretary cannot make such a showing here. While the Secretary correctly argues that courts should use objective criteria in determining EAJA entitlement, all three objective criteria identified by Congress--past government losses on an issue, resolution of a case against the government on the pleadings, and a settlement agreement which gives plaintiffs all they asked for in their complaint--favor a fee award in this case.

Neither the stay without opinion in Underwood nor the granting of certiorari in two related cases militates against an award of fees under EAJA. First, as the Secretary himself suggests, courts should evaluate a case primarily from the standpoint of the litigants at the outset of the litigation, and both the stay and the certiorari grants took place after this suit was filed.

Second, neither the stay nor the decision to hear two related cases was a ruling on the merits of the case. In 1976, parties often obtained stays without showing probable success on the merits, and it is virtually black letter law that a decision to grant or deny certiorari does not reflect on the merits of a case. To impute attorneys' fees significance to intermediate procedural rulings such as stays would place inappropriate pressure on future litigants to argue the merits when

making procedural motions, and on the courts to decide the merits when they need not do so. Thus, the only relevant objective criteria favor a fee award in this case.

Plaintiffs do not dispute the right of the government to pursue repeated and unsuccessful litigation of an issue throughout the country until the issue is finally resolved. That right is not at stake in this case. Rather, the question is whether the government should pay to exercise that right, or whether, instead, successful litigants should be forced to incur hundreds of thousands of dollars in attorneys' fees to subsidize the government's litigation strategy. Congress decided that the government should pay, and the courts below appropriately implemented that Congressional decision.

The Secretary also errs when he argues that the amount of fees awarded below was

excessive. Though EAJA limits fee awards in most cases to $75 per hour, a court may award higher fees when it determines that "a special factor, such as the limited availability of qualified attorneys . . . justifies a higher fee." The Secretary fails to recognize that any special factor may ever exist other than the limited availability of qualified attorneys. His position reads out of EAJA the language "a special factor, such as," in violation of elementary principles of statutory construction; ignores the legislative history of EAJA, which recognizes that exceptional cases justify higher awards; and would thwart the remedial purposes of EAJA by discouraging attorneys from litigating against the government in cases that are likely to be protracted and complex. A fair reading of EAJA compels the conclusion that in a few special cases, which require especially difficult and complex work, and

in which counsel achieve extraordinary results for their clients while performing work of the highest calibre, fees at market rates higher than $75 per hour are justified.

The courts below did not abuse their discretion in holding that Underwood was one of those special cases. The case involved the largest class action settlement fund--$60 million--ever administered by legal aid counsel. The experienced trial judge found that the successful distribution of $45 million in light of the unique problems presented by this case required both "tireless dedication" and the highest quality of services.

In addition, the limited availability of counsel--the one factor expressly identified in EAJA--justified the award below. Plaintiffs presented evidence to the trial court that no other attorneys, regardless of qualifications, would have

taken the Underwood case, while the Secretary presented no evidence to the contrary. The trial court did not abuse its discretion when it found that limited availability of counsel, as well as other special factors, justified a higher fee.

Throughout his arguments concerning entitlement and amount and more expressly in his earlier petition for writ of certiorari, the Secretary suggests that the courts below and other federal courts have lost sight of the limited scope of EAJA. The Secretary paints a picture of runaway courts issuing fee awards never intended by Congress.

These kinds of suggestions are easily made and usually difficult to refute--but not in this case. When EAJA sunsetted in 1984, Congress debated for two years the form of its revival. Congress considered several changes to the legislation, and Congressional committees reviewed in

unusual detail the body of law that had developed under EAJA, criticizing more than twenty cases. If it were necessary to rein in overly generous federal courts, Congress had the opportunity to do so.

Instead, each of the several changes Congress made to EAJA made it easier, not more difficult, to recover fees under the statute. Congress did not criticize a single decision for awarding fees to undeserving litigants or for making excessive awards. Rather, every opinion criticized by Congress construed EAJA too narrowly. Given a direct choice, Congress sent a clear message to the courts that EAJA should be construed liberally to fulfill its beneficial purpose.

The Secretary has made a number of policy arguments in support of his position in this case. Plaintiffs respectfully request that this Court, when reviewing these arguments, determine whose position--

the Secretary's or that of the courts below--best reflects the intent of Congress. Plaintiffs are confident that this determination can only lead to a decision affirming in its entirety the judgment of the Court of Appeals.

ARGUMENT

I. A BRIEF HISTORY OF THE OPERATING SUBSIDY AND EAJA LEGISLATION AND LITIGATION

This nationwide class action was the culmination of a long dispute between the Secretary of Housing and Urban Development on the one hand and Congress and low income tenants on the other hand over the Secretary's refusal to implement the Section 236 operating subsidy program. The tenants prevailed before every court that heard the case on the merits, including 10 district courts and 2 unanimous courts of appeals, and ultimately won a $60 million nationwide settlement.

More than six years after the filing of Underwood the settlement process was completed, and the parties' dispute shifted to the issue of attorneys' fees under the newly enacted Equal Access to Justice Act. The courts below held that the government had not been substantially justified in its position. The courts also found that special factors--including the complexity, length and difficulty of the case, the extraordinary result, the high calibre of counsel's representation, and the limited availability of qualified counsel--justified a fee award based on market rates not limited by EAJA's $75 per hour cap on fees in ordinary cases.

The following brief review of the history of the operating subsidy program, the litigation between the Secretary and low income tenants, and the adoption of the Equal Access to Justice Act underscores two points. First, all objective indicators,

especially the Secretary's unbroken string of operating subsidy litigation defeats, compel the conclusion that the government's position was not substantially justified. Second, this case raises special factors, mandating affirmance of the full fee award below.

Congress created the Section 236 operating subsidy program in 1974,[1] requiring the Secretary to make payments from a reserve fund to owners of HUD supported Section 236 apartment projects to offset rising costs of property taxes and utilities, and to prevent rent increases. Tenants in the projects were all poor people "with incomes so low that they could not otherwise decently house themselves." 12 U.S.C. § 1701t.

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[1]The program was codified until 1977 at 12 U.S.C. (1970 ed. & Supp. IV 1974) § 1715z-1 (f) and (g).

In enacting the operating subsidy provisions of Section 236, Congress affirmed the importance of the Section 236 program and criticized the Secretary for abandoning it.[2] Nonetheless the Secretary refused to make any operating subsidy payments, while accumulating millions of dollars in the reserve fund. Instead, he allowed project owners to increase rents, passing on the cost of taxes and utilities to the low income tenants.

Congress responded to the Secretary's "continuing effort to kill the Section . . . 236 programs" by slashing the Secretary's budget, and noting that HUD "personnel have been used to obstruct rather

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[2]"The Committee is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program. * * * The Section 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs." S. Rep. 93-1091, 93rd Cong., 2d Sess. 6-7 (1974).

than carry out directives of the Congress." S. Rep. 94-326, 94th Cong., 1st Sess. 11-12 (1975).

The Secretary's refusal to pay operating subsidies also led to a series of lawsuits filed by low income Section 236 tenants. The Secretary lost each and every case, but refused to change his policy. The Secretary would pay subsidies only on behalf of tenants who won a court order.

After the Secretary had lost in nine District Courts,[3] plaintiffs filed

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[3]Ross v. Community Services, Inc., 405 F.Supp. 831, 396 F.Supp. 278 (D. Md. 1975); Dubose v. Hills, 405 F.Supp. 1277 (D. Conn. 1975); Abrams v. Hills, 415 F.Supp. 550 (C.D. Cal. 1975); Harrison v. Hills, (W.D. Pa. C.A. No. 75-938, Oct. 1, 1975); Carberry v. Hills (D. Mass. C.A. No. 76-521-F, March 8, 1976); Parker Square Tenants Ass'n v. HUD, (W.D. Mo. C.A. No. 75 CV 577-W-3, Jan. 27, 1976); Gertsch v. Hills, 414 F.Supp. 15 (D. Utah C.A. No. C75-513, March 5, 1976); Folsom Gardens Action Comm. v. Hills (E.D. Cal. C.A. No. S-76-43-TJM, Feb. 12, 1976); Campbell v. HUD (N.D. Ohio C.A. No. C 75-471, Dec. 22, 1975). Dubose v. Hills, 405 F.Supp. 1277, consisted of three consolidated cases filed by tenants in Connecticut. Eventually six more cases

(continued...)

Underwood on behalf of a nationwide class of all Section 236 tenants who had not yet prevailed. The Secretary not only opposed the suit on the merits, but also opposed certification of a nationwide class, arguing that low income tenants should be required to file separate suits at each of the thousands of projects in the United States.[4]

Plaintiffs moved for class certification and a preliminary injunction. District Court Judge John Pratt, ruling from the

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[3](...continued)
were joined with Dubose and the consolidated action was certified as a statewide class. 22 Fed.R.Serv.2d 476 (D. Conn. 1976).

[4]Defendants' Memorandum In Support Of Its Opposition To Plaintiffs' Motion For Class Certification. United States Court of Appeals for the Ninth Circuit, No. 83-5773, Appellees' Supplementary Excerpts of Record 1 at 15 (hereinafter "Ninth Cir. Supp. Ex. Rec. __"), Clerk's Record 11 at 12 (hereinafter "C.R. __").

bench, certified the nationwide class and on his own motion entered a permanent injunction against the Secretary. The injunction mandated payment of retroactive and prospective operating subsidies. Underwood v. Hills, 414 F.Supp. 526 (D.D.C. 1976).

This Court stayed that injunction without issuing an opinion. Hills v. Underwood, 429 U.S. 892 (1976). Two United States courts of appeals held in unanimous decisions that the Secretary was required to pay operating subsidies; this Court granted certiorari in those cases. Ross v. Community Services, Inc., 544 F.2d 514 (4th Cir. 1976), cert. granted, 431 U.S. 928 (1977); Abrams v. Hills, 547 F.2d 1062 (9th Cir. 1976), cert. granted, 431 U.S. 928 (1977). No court or judge ever upheld the Secretary's claim that he had discretion to refuse to pay operating subsidies.

The parties subsequently settled Underwood and all the other operating subsidy cases in 1978. The settlement required the Secretary to make available for distribution to low income tenants all $60 million that had accumulated in the reserve fund. The distribution was handled by plaintiffs' counsel, assisted by other members of a committee of counsel and the accounting firm of Price Waterhouse & Co. Stipulation of Settlement, Ninth Cir. Ex. Rec. 125 at 130-32; C.R. 68 at 6-8.

During the course of the settlement, the District Court expressed frustration at the Secretary's failure to provide the basic information required of him by the settlement,[5] and Price Waterhouse estimated

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[5]"[THE COURT: It] takes an attorney with a certain amount of patience--perhaps even an inordinate amount of patience--to handle this matter because of the level of frustration that was created by your [the Secretary's] office.

"It made it very difficult. I was amazed

(continued...)

that the Secretary's failures increased the cost of the administration of the settlement by $1 million.[6] Despite these difficulties, by 1981 plaintiffs' counsel had distributed approximately $45 million[7] to

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[5](...continued)
that counsel was unable to get from HUD a complete list of all of the projects to which HUD sends money every month. That just astonished me." Reporter's Transcript of Proceedings ("R.T."), October 14, 1982, 30-31.

[6]Notice of Motion and Motion for Contempt and Other Relief for HUD's Violations of Stipulation of Settlement and For Order Requiring HUD to Reimburse Settlement Fund for Costs Incurred in Performing Tasks Agreed To Be Performed by HUD; Declaration of James C. Sturdevant and Exhibits. Ninth Cir. Supp. Ex. Rec. 86 at 98, C.R. 502 at 12. The District Court denied the motion for contempt, noting that the government's performance during settlement "has bordered on the satisfactory." R.T., Jan. 26, 1983, 24.

[7]Plaintiffs returned to the Secretary about $15 million in principal and $9 million in interest earned on the settlement fund. Application to Approve Filing of Quarterly Financial Statement and For Approval of Security Pacific National Bank
(continued...)

more than 145,000 eligible claimants.

In that same year the Equal Access to Justice Act went into effect, guaranteeing fee awards to prevailing parties in litigation against government agencies whose positions were not "substantially justified." A paradigm EAJA case identified by Congress was one in which the government persisted in pressing positions already rejected by the courts.

The Underwood plaintiffs moved for an EAJA fee award. The District Court entered an award compensating counsel for more than 3,300 hours of work. The District Court found, and the Ninth Circuit affirmed, that the Secretary's position in Underwood was not substantially justified, and EAJA therefore required the shifting of the

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[7](...continued)
Report and Price Waterhouse & Co. Financial Statement for January 1983 at 6. Ninth Cir. Supp. Ex. Rec. 107 at 112, C.R. 532 at 5.

costs of litigation to the Secretary whose conduct had made the Underwood suit necessary. The Court of Appeals also affirmed the District Court's finding of special factors justifying a market rate award in excess of $75 per hour.

II. THE SECRETARY HAS FAILED TO CARRY HIS BURDEN OF PROOF THAT HIS POSITION WAS SUBSTANTIALLY JUSTIFIED

A. The Secretary Bears the Burden of Proving That His Position Met the High Standard of Substantial Justification.

Under the Equal Access to Justice Act, the burden is on the government to prove that its position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A).[8] "[T]he strong deterrents to contesting

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[8]Section 2412(d)(1)(A) provides, in relevant part: "[A] court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified. . . ."

Government action require that the burden of proof rest with the Government." H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10, (1980), reprinted in Award of Attorneys' Fees Against the Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 332 at 341 (1980) (the Hearings on S. 265 are hereinafter referred to as "1980 EAJA House Hearings __").[9]

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[9]The courts of appeals have consistently held that the government bears the burden of proof on the issue of substantial justification. See, e.g., Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1087 (2d Cir. 1983); Tressler v. Heckler, 748 F.2d 146, 149 (3d Cir. 1984); Herron v. Bowen, 788 F.2d 1127, 1130 (5th Cir. 1986); Wheat v. Heckler, 763 F.2d 1025, 1028-29 (8th Cir. 1985); Wolverton v. Heckler, 726 F.2d 580, 583 (9th Cir. 1984); Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984); Ellis v. United States, 711 F.2d 1571, 1575 (Fed. Cir. 1983).

The Secretary seeks to strengthen his case by mischaracterizing Congress' intent in adopting the substantial justification test. First, the Secretary equates substantial justification with reasonableness. Then he asserts that he meets that standard if he proves that his position had some substance and a fair possibility of success. As demonstrated below, the Secretary's restatement of his burden misstates Congress' intent, although under any standard, including the one the Secretary proposes, his position in Underwood does not pass muster.[10]

The Department of Justice originally opposed EAJA's substantially justified

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[10]The Court of Appeals below held that reasonableness was the standard. Even under that standard it upheld the District Court's finding that the Secretary's position was not substantially justified. Underwood v. Pierce, 761 F.2d 1342, 1346 (9th Cir. 1985).

test.[11] Instead the Department proposed that the government should only be liable for fees if its conduct were "arbitrary, frivolous, unreasonable, or groundless."

The Department's proposal was rejected:

> [T]he predecessor to S. 265 [EAJA] in the 95th Congress allowed for automatic awards of fees to prevailing parties. . . . The Department of Justice proposed standard, on the

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[11]The Secretary argues that because the substantial justification language was taken from Rule 37, Federal Rules of Appellate Procedure, Congress intended to strictly limit fee awards. (Brief for the Petitioner, 15, n.6 (hereinafter "Pet. Br. __"). However, in 1980 the Department of Justice told Congress that Rule 37 held the government to a high standard which required more than that its conduct was not unreasonable. "[T]he substantial justification standard [of Rule 37] does not sufficiently focus the relevant issues. . . . This could result in the requirement that the government pay fees not when its conduct was arbitrary or unreasonable, but rather where it had made an honest mistake or misjudgment regarding the facts or law in a given case." 1980 House EAJA Hearings 487-88 (statement of Raymond S. Calamaro, Deputy Assistant Attorney General, Office of Legislative Affairs).

> other hand . . . is unnecessarily restrictive. Under the Department's proposal, fees would be awarded only where the government action was "arbitrary, frivolous, unreasonable, or groundless. . . ."
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> * * *
>
> The standard and burden of proof adopted in S. 265 ["substantially justified"] represents an acceptable middle ground between an automatic award of fees and the restrictive standard proposed by the Department of Justice.

H.R. Rep. 96-1418 at 13-14, 1980 EAJA House Hearings 344-45.[12] Accord S. Rep. 96-253, 96th Cong., 1st Sess. 2-3 (1979), reprinted in 1980 EAJA House Hearings 237, 238-239.

When Congress rejected the Justice Department's alternative language, it expressly intended to reject "unreasonable" as the test, not just the other suggested standards (arbitrary, frivolous, or

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[12]The Secretary cites and relies on the above quote (Pet. Br. 14), but omits from his brief the language pointing out that the "middle ground" Congress sought was between the test the Secretary offers here ("unreasonable") and an automatic award.

groundless).[13] The Senate Judiciary Committee considered an amendment which would simply have changed "substantially justified" to "reasonably justified." That too was defeated. S. Rep. 96-253 at 8, 1980 EAJA House Hearings at 244.

When Congress considered bills to revive EAJA after it sunsetted, Congress reaffirmed its original decision to reject a simple reasonableness standard. ("Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness.") H.R. Rep. 98-992, 98th Cong., 2d Sess. 7 (1984); ("[R]easonably justified is not good

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[13]"MR. KASTENMEIER: What was your view, that 'substantially' justified would be more difficult for the agency or department to meet, than 'reasonable.'"

"SENATOR DeCONCINI [a sponsor of EAJA]: Yes, sir, that's correct, Mr. Chairman." 1980 EAJA House Hearings 38.

enough. We turned that down before. . . . [B]y substantially justified we intend to mean more than reasonably justified.") 130 Cong. Rec. H9300 (daily ed. September 11, 1984) (statement of Rep. Sawyer).[14]

In reviving EAJA, Congress specifically disapproved court decisions that had interpreted the Act to require only that the government's position be reasonable.

> Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,'

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[14]The committee report (H.R. Rep. 98-992) and the statement of Representative Sawyer concerned a bill, H.R. 5479, 98th Cong., 2d Sess. (1984), which passed Congress but was vetoed. It carried forward the identical "substantially justified" and "special factor" language of the original and the revived EAJA. This Court has recognized that the legislative history of such bill may be consulted to evaluate the identical language in the bills that became law. Cannon v. University of Chicago, 441 U.S. 677, 694-95, n.16 (1978); Bowen v. Gilliard, 107 S.Ct. 3009, 3016, n.14 (1987).

> the test must be more than mere reasonableness.

H.R. Rep. 99-120, 99th Cong., 1st Sess. 9 (1985).

The Secretary characterizes this 1985 House report as modifying the substantially justified test. Therefore, the Secretary argues, the Report should not be given dispositive weight, because the full Congress meant to reenact EAJA without changing that standard. (Pet. Br. 16.) To the contrary, as demonstrated above the 1985 House report simply reiterated Congress' original intent.

The Secretary also questions the reliability of the 1985 House report because some members of Congress criticized a portion of the report on the floor. (Pet. Br. 17-18.) However, statements of individual legislators which conflict with committee reports generally should be disregarded. Garcia v. United States, 469

U.S. 70, 76 (1985). Moreover, the portion questioned during debate did not address the relationship between reasonableness and substantial justification. Rather, it concerned an issue not raised in this case--whether the government's position is not substantially justified as a matter of law if the government lost on the merits because an agency decision was not supported by substantial evidence. No member of the House or Senate criticized the House report's rejection of "reasonably justified" as a substitute for "substantially justified."[15]

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[15]See 131 Cong. Rec. H4763 (daily ed. June 24, 1985) (remarks of Rep. Kindness) ("The committee report should not be interpreted to suggest that a finding of an agency action that was not supported by substantial evidence would automatically entitle a prevailing party to fees. . . ." "[This was] the only error I found in the report."); accord id. (remarks of Reps. Kastenmeier and Moorhead); 131 Cong. Rec. S9993 (daily ed. July 24, 1985) (remarks of Sen. Grassley).

Despite Congress' expressed intent to adopt a high standard, the Secretary has suggested rephrasings of substantially justified which do not even fairly restate a reasonableness test. The Secretary suggests the inquiry should be whether the government's position had "some substance" or a "fair possibility" of success. (Pet. Br. 16, 19.)

That restatement thwarts Congress' intent to require the government to make a strong showing. Government counsel should always be able to form an argument with some substance, and at least a fair possibility of success. As one of the sponsors of EAJA noted in rejecting the Justice Department's suggestion that the test should be whether the government's position was "groundless":

> It simply makes no sense to me to tell the citizen who has successfully fought back against a Government order or citation that he will be made whole only if he can show that the Government's pursuit was groundless.
>
> I would like to think that no government action is "groundless."

1980 EAJA House Hearings at 28 (statement of Sen. DeConcini).

But in effect "groundless" is the standard the Secretary suggests. The Secretary asserts that if his case had "some substance" fees should be denied. Conversely, one must assume that fees should be awarded only when the government's position had no substance, i.e., when it was groundless. But that is the exact standard rejected by Congress. The Secretary's attempt to meet his burden of proof by restating it into oblivion must be rejected.

B. All Objective Indicia Reflect That the Government Cannot Meet Its Burden Of Proof That Its Position Was Substantially Justified.

The Secretary suggests that this Court should primarily look to objective indicia in determining whether the Secretary met

the burden of proving his position was substantially justified. Plaintiffs agree.

Congress identified three strong indicators that the government's position was not substantially justified--whether the government was pressing claims already rejected by the courts, whether the merits were easily resolved, and whether a settlement was so one-sided as to suggest that the government knew it was not going to prevail. Each of these indicia compel a finding that the Secretary was not substantially justified in this case.

1. The Objective Indicium of the Secretary's Prior Operating Subsidy Losses Compels the Conclusion That the Secretary Was Not Substantially Justified in Underwood.

In enacting and later reviving EAJA, Congress put special emphasis on the objective indicium of prior court decisions. In enacting EAJA, both House and Senate committees noted that:

> Certain types of case dispositions may indicate that Government action was not substantially justified. A court should look closely at individual cases, for example, . . . where a prior suit on the same claim has been dismissed or lost on the merits. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the action or was merely forum shopping.

H.R. Rep. 96-1005, 96th Cong., 2d Sess. Pt. 1 at 10 (1980), reprinted in 1980 EAJA House Hearings 191, 200. Accord S. Rep. 96-253 at 6-7, 1980 EAJA House Hearings 242-43; H.R. Rep. 96-1434, 96th Cong., 2d Sess. 22, (1980), reprinted in 1980 EAJA House Hearings 373, 394; H.R. Rep. 96-1418 at 11, 1980 EAJA House Hearings 342. ("It is expected that this bill will make the United States proceed more cautiously and evaluate its losses.") H.R. Rep. 96-1418 at 20, 1980 EAJA House Hearings at 351.

The courts also quickly recognized the significance of this indicator. See, e.g., Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983) ("Previously decided cases

are surely a factor. . . . The more often an issue is decided against the government the more unreasonable advancing such a claim again will be."); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250-51 (9th Cir. 1984) ("Relitigating a previously decided issue is a strong factor weighing against the government in determining substantial justification. . . . [P]rior adverse litigation is ordinarily the most important factor to consider. . . .")

When Congress revisited EAJA after it sunsetted, Congress specifically approved cases stating that a prevailing party should be entitled to a fee award when a government agency continues to press a position that has already been rejected in court.

> To ignore precedent is not a "substantially justified" position. . . . There are numerous instances of an agency's failure to follow precedent in the context of an EAJA case. See National Resources Defense Council v. U.S.E.P.A., 703 F.2d at 712; Citizens Bank v. United States,

558 F.Supp. 1301 (N.D. Ala. 1983); Dubose v. Pierce, 579 F.Supp. 937 (D. Conn. 1984).

S. Rep. 98-586, 98th Cong., 2d Sess. 12 (1984).

The Dubose case cited in the report was the third in the unbroken string of nine operating subsidy cases the Secretary lost prior to Underwood.[16] If Congress identified Dubose as a case in which EAJA supported an award of fees because of the government's persistence in pressing previously unsuccessful arguments, then EAJA must compel an award in Underwood.[17]

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[16]Dubose v. Hills, 405 F.Supp. at 1282, n.21.

[17]The Secretary suggests, however, that Congress did not intend to discourage the government from advancing novel but credible extensions of the law. (Pet. Br. 14, n.4.) In this case, however, there was nothing novel or credible about the Secretary's arguments--they had been totally rejected by nine different courts prior to Underwood.

Congress identified cases in which the government repeatedly raised losing arguments as a paradigm for cases in which an EAJA award should be made. Underwood is a classic example of the paradigm.

(a) This Court's 1976 stay does not support the Secretary's argument that his position was substantially justified.

The Secretary ignores the force of the numerous lower court losses that preceded Underwood. Instead, he argues that the fee award should be reversed by characterizing this Court's 1976 stay of the nationwide injunction in Underwood as a prior favorable ruling on the merits for the government. The Secretary's reliance on the stay is misplaced both because it was not a prior court action, and because it was not a ruling on the merits.

As the Secretary's brief convincingly suggests, whether the government position is substantially justified generally should

be viewed from the standpoint of the parties at the outset of the litigation. Pet. Br. 20-22. Thus, among the indicia identified by Congress, the greatest weight should be given to court decisions rendered before the filing of the complaint. This is true whether one views the case from the standpoint of the government or the standpoint of the plaintiff.

As the Secretary points out, government lawyers should be able "to rely on past successes as settling the reasonableness of the government's position." Id. 20-21; see also id. 21 (arguing that "prior" favorable judicial assessments of the government's position should serve as a shorthand that its position was justified under EAJA).[18] By the same token, those

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[18]Though the Secretary is correct that the government should be able to rely on past successes, the Secretary takes the argument too far. He urges that if a single judge, even in a dissenting opinion, accepts the government's position, that

(continued...)

government lawyers should understand that past failures on an issue demonstrate the government's lack of substantial justification in unsuccessfully re-litigating that

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[18](...continued)
position must have been substantially justified, presumably no matter how many other judges have ruled against the government. Pet. Br. 10, 20.

Such a rule would only encourage the government, having repeatedly lost on a particular issue, to shop for a judge who will agree with it on that issue. If the single judge's ruling or dissenting opinion is patently contrary to precedent, the Secretary's rule would be particularly unfair. For example, the government should not be able to show substantial justification if it were able to convince a single judge that the First Amendment does not apply to the states. See Wallace v. Jaffree, 472 U.S. 38 (1985). The better rule is the one followed in the lower courts: that just as the United States is not liable for fees merely because it lost, "Neither is the United States exempted from the payment of fees and expenses merely because it prevailed at some point in the judicial process." Martin v. Heckler, 754 F.2d 1262, 1264 (D.C. Cir. 1985).

Of course, the Secretary's argument does not apply to the facts of this case, in which no judge ever ruled in favor of the government's position on the merits.

issue. In this case, at the time this suit was filed, the Secretary had litigated the operating subsidy issue in nine courts, and lost each time. The Secretary is not justified in relying on his "past successes" because there were none.

The Secretary also points out the importance to plaintiffs of looking at the pre-litigation status quo. Court rulings prior to litigation are important, the Secretary argues, because

> The prospect of lengthy and unpredictable litigation about the availability of fees may make it impossible for persons interested in contesting government action to gauge the likelihood of a fee recovery. That uncertainty, and the expense associated with resolving it, may discourage challenges to unjustified government action.

Pet. Br. 21-22.

Again, the Secretary is correct. Unless a potential plaintiff may rely on past judgments against the government, uncertainty will discourage challenges to unjustified governmental action. Though a

plaintiff still must prevail in order to recover fees under EAJA, a prevailing plaintiff generally should not be denied fees because of unanticipated later events.

Moreover, even if a subsequent event could be considered in evaluating substantial justification, the stay should be given no weight because it was not an expression of this Court's view on the merits. At the time the stay was issued, this Court did not require in most cases that petitioners establish that they were likely to prevail on the merits. Moreover, the stay should not be treated as a predictor of the merits, for to do so would inject unintended and unnecessary issues into consideration of all government petitions for stays.

In the 1970's, individual Justices wrote a number of in-chambers opinions stating that the test for issuance of a stay in a certiorari case had only two

parts--whether a petition for certiorari would be granted, and whether the balancing of the equities, including the possible mooting of the case, favored the issuance of a stay. See, e.g., Beame v. Friends of the Earth, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers). Accord New York Times Co. v. Jascalevich, 439 U.S. 1304 (1978) (Marshall, J., in chambers); Coleman v. Paccar, Inc., 424 U.S. 1301, 1302 (1976) (Rehnquist, J., in chambers);[19]

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[19]The Secretary cites Coleman in support of his argument that this Court evaluated the merits when it issued stays in certiorari cases in the 1970's (Pet. Br. 22). To the contrary, then-Justice Rehnquist noted in dicta in Coleman that ". . . in the usual posture of a stay application where . . . the losing litigant seeks a stay . . . pending the filing of a petition for certiorari . . . the question is whether four Justices are likely to vote to grant certiorari, and what assessment is to be made of the equities pertinent to the grant of such interim relief." 424 U.S. at 1302. The portion of the opinion cited by the Secretary is discussing the criteria courts of appeals should use in issuing a stay in an appeal, not the criteria this Court should use in a certiorari case.

Houchins v. KQED, Inc., 429 U.S. 1341 (1977) (Rehnquist, J., in chambers). See also Dayton Board of Education v. Brinkman, 439 U.S. 1357 (1978) (Stewart, J., in chambers) ("To avoid disrupting the school system during our consideration of the case, the stay should be denied. This disposition, of course, does not reflect any view on the merits. . . .").

The stay case from this era most like Underwood is Edelman v. Jordan, 414 U.S. 1301 (1973) (Rehnquist, J., in chambers). In Edelman a welfare director had been ordered to make prospective and retroactive benefit payments to a class of low income plaintiffs. In his opinion staying the retroactive relief, Justice Rehnquist did not evaluate the strength of the petitioner's case on the merits. Instead, the opinion discussed the likelihood that the Court would grant a petition for a writ of certiorari and whether the equities

required a stay to prevent the case from becoming moot. Justice Rehnquist noted that if the "judgment is not stayed, I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out . . . to respondent welfare recipients and members of the class he represents. Respondent, on the other hand, will be able to collect from petitioner all of the back payments found due . . . should he prevail." Id. at 1302-03.

Similarly, the Underwood stay petition sought to prevent distribution of millions of dollars in retroactive public benefits to a class of hundreds of thousands of impecunious individuals. As in Jordan, this Court may have decided in Underwood only that the Secretary could never obtain relief if he ultimately prevailed on the merits if the funds in dispute were already

distributed, and so issued the stay to preserve the status quo.

The Secretary, relying primarily on in-chambers opinions issued after Underwood, however, asserts that the issuance of the stay necessarily involved a consideration of the merits. For example, the Secretary relies on Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J., in chambers), in which Justice Brennan raised a new issue--whether "there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." 448 U.S. at 1308.

Several commentators have noted that this Court did not begin to ask that question in evaluating whether to issue a stay in certiorari cases (as opposed to appeals) until the early 1980's. See, e.g., R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986), in which the authors discuss the long-standing

requirement that a petitioner seeking a stay in a certiorari case only had to establish irreparable injury and that the Court would choose to hear the case. The authors then note that in direct appeals, on the other hand, the petitioner had to establish the likelihood of prevailing on the merits. They explain that this requirement of a showing on the merits was extended to certiorari cases in the 1980's. Id. at 693-94. See also "Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices," 32 U.C.L.A. L.Rev. 1020, 1032 (1985), noting that "The likelihood that four Justices will vote to grant certiorari is the threshold consideration in reviewing stay applications. In recent years, an increasing number of stay opinions also address the applicant's likelihood of prevailing on the merits." (Emphasis added.)

Nonetheless, some in chambers-opinions in the 1970's discussed the merits of the petitioner's position, even though the Justice first stated that the test was only whether the Court would grant certiorari and the balancing of the equities. See, e.g., Beame v. Friends of the Earth, 434 U.S. at 1314. And, as the Secretary points out, other in-chambers opinions in the 1970's stated that the Court should consider the merits in deciding whether to issue a stay in a certiorari case. See, e.g., Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers).

The only thing that can be said for certain is that in 1976, when the Secretary obtained a stay from this Court, the standards for issuance of a stay were evolving.[20] In evaluating the Underwood

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[20]Even in recent years in-chambers opinions have suggested that stays may be
(continued...)

stay petition, some Justices may have thought the merits were relevant while others may not have. Those who thought the merits were relevant may have voted either for or against issuance of the stay. In any event, the stay was issued with no statement of reasons, and two courts of appeals unanimously ruled against the Secretary's position on the merits, despite the stay.

The courts below properly chose not to hypothesize about this Court's reasons for issuing the stay. If Supreme Court stay decisions are treated as dispositive on later motions for attorneys' fees, the

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[20](...continued)
issued for equitable reasons in certiorari cases, without consideration of the merits. See, e.g., Garrison v. Hudson, 468 U.S. 1301 (1984) (Burger, C.J., in chambers), in which the Chief Justice, without evaluating the merits, granted a stay to preserve the status quo since "foreclosure of certiorari review . . . would impose irreparable harm" by making the case moot.

consideration of stay petitions will be unnecessarily and inappropriately complicated. The parties to a petition for stay would feel compelled to brief the merits as fully as if the Court had already granted certiorari. And this Court may feel compelled to issue opinions with all stay decisions, either resolving the merits or expressly stating that it did not evaluate the merits, to avoid prejudicing later fee motions. Stay procedures were not designed for fee purposes.[21] The Court should

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[21]This Court has already concluded in a somewhat similar situation that intermediate procedural rulings that do not finally adjudicate the parties' rights should not be binding in later attorneys' fee motions. In Hewitt v. Helms, ___U.S. __, 107 S.Ct. 2672 (1987), a prisoner secured a Court of Appeals ruling which reversed a summary judgment against him and held that if the defendant prison officials were not immune from suit the prisoner should be awarded summary judgment on his due process claims. On remand, the trial court entered judgment against the prisoner on the ground that the defendants were immune from suit. In subsequent fee litigation, this Court held that the appellate victory did not make the prisoner
(continued...)

decline the Secretary's invitation to use them in that manner here.

(b) The grants of certiorari do not support the Secretary's argument that his position was substantially justified.

In granting the stay this Court did not rule on the merits, but undoubtedly did consider whether a petition for writ of certiorari would be granted in Underwood. Also, this Court later granted certiorari in the two related cases raising the

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21(...continued)
a prevailing party entitled to attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. § 1988).

Although the question of whether a party prevailed is different from whether a party's position was substantially justified, some of the reasoning in Hewitt is applicable to this case. This Court in Hewitt identified practical reasons for refusing to make an intermediate procedural victory dispositive of a fee issue. If the effect of language in an opinion that did not resolve the merits were to serve as a predicate for a fee award, the courts might be forced to take that into account before writing such language. Id. at 2677.

identical issues. Thus it is necessary to consider whether the grants of certiorari in Ross and Abrams, and the probability that certiorari would have been granted in this case, constitute a judicial ruling of adequate clarity to be an objective indicator that the government's position was substantially justified in Underwood.

The Secretary suggests that "[i]n the absence of a conflict in the circuits, it is unlikely that the Court would have granted the government's petitions in [Ross and Abrams] had the Secretary's argument been viewed as wholly without merit."[22] Pet. Br. 25. To the contrary, Rule 17(c) of this Court provides for review by writ of certiorari not only when there is a conflict in the circuit courts but also when a lower court "has decided an

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[22]As argued above, "wholly without merit" (i.e., groundless) is not the test under EAJA for an award of fees.

important question of federal law which has not been, but should be settled by this Court. . . ." As then-Justice Rehnquist has stated, "we must never forget that this Court is not a forum for the correction of errors." Boag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). "'The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari, nor, for that matter, is the fact a case may have been rightly decided in itself enough to preclude certiorari. . . .' The Court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance." Stern, Gressman & Shapiro, Supreme Court Practice 221. (Citation omitted.) This Court could readily have determined that nationwide litigation concerning the Secretary's refusal to implement a multi-million dollar housing

program established by Congress presented an important federal issue, without making a determination that the government's position was meritorious.

Moreover, whatever the Court's view of this case was when it decided to grant certiorari, it never had the opportunity to examine the case after full briefing on the merits and oral argument. The Secretary's suggestion to the contrary notwithstanding, this Court frequently has granted certiorari in cases which apparently presented no conflict in the lower courts, only later to affirm the judgments of the courts below unanimously. See, e.g., Caterpillar, Inc. v. Williams, __ U.S. __, 107 S.Ct. 2425 (1987); Kimmelman v. Morrison, __ U.S. __, 106 S.Ct. 2574 (1986); Northeast Bancorp., Inc. v. Board of Governors, 472 U.S. 159 (1985); Russell v. United States, 471 U.S. 858 (1985); Ohio v. Kovacs, 469 U.S. 274 (1985). Whether the justices in those

cases changed their minds or always intended to affirm is both speculative and irrelevant. The point is that a decision to grant certiorari is neither a decision on the merits nor an accurate barometer of the eventual resolution of a case.

The only courts that did decide the merits of this case after full briefing and argument--10 district courts and 2 courts of appeals, 16 judges in all--ruled in plaintiffs' favor. No court ever ruled in the Secretary's favor on the merits.

Congress identified as a strong indicator of the lack of substantial justification the persistence of the government in arguing positions that have already failed in the courts. If ever there were a case in which this indicia required a finding that the government was not substantially justified, it is Underwood, the unexplained stay and grants of certiorari notwithstanding.

2. Other Objective Indicia Further Evidence That The Secretary Was Not Substantially Justified In Underwood.

Congress identified two other objective indicia by which the substantial justification of the government's position could be measured. These are whether the court was able to resolve the case easily on the pleadings and the terms of any settlement.

> Certain types of case dispositions may indicate that Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or . . . where there is a substantial difference between the amount or content of the Government's original pleadings and the settlement agreed to. Such cases clearly raise the possibility that the Government was not substantially justified in pursuing the litigation.

H.R. Rep. 96-1434 at 22, 1980 EAJA House Hearings 394.

These two additional indicia strongly suggest that the government was not

substantially justified in Underwood. As noted above, plaintiffs appeared before the District Court in 1976 on a motion for preliminary injunction. District Judge Pratt, ruling from the bench sua sponte, treated the motion for preliminary injunction as a motion for summary judgment, and issued a permanent injunction of nationwide effect.

Further, the Secretary eventually settled for the entire amount at stake, even though the Supreme Court had stayed the injunction. The Secretary argues that using a settlement favorable to the plaintiffs as an objective factor supporting a fee award would discourage the government from making settlements. Pet. Br. 26-27, n.13. To the contrary, EAJA strongly encourages the government to settle quickly. If the government settles immediately after plaintiffs sue to challenge an unjustified action, the government's

liability for fees will be limited to compensating counsel for a few hours of work.[23] Only if the government refuses to settle at the outset and unnecessarily protracts litigation will it face significant fee liability.

Congress has expressly identified a favorable settlement as a factor militating towards a fee award. The Court should refuse to substitute the Secretary's policy argument for the policy decision already made by Congress.

Plaintiffs agree with the Secretary that EAJA cases should be resolved whenever possible by reliance on objective indicia. In this case, every objective indicia identified by Congress indicates that the

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[23]In a suit in which the government believes in good faith that it has a strong case, but nonetheless decides to settle for policy reasons, it may seek a waiver of fees in return for concessions during negotiations. Evans v. Jeff D., 475 U.S. 717 (1986).

government's position was not substantially justified and that the fee award should therefore be affirmed.

C. The Secretary Cannot Show That His Arguments on the Merits Were Substantially Justified.

The substantial justification test will usually require some evaluation of the arguments on the merits. In Underwood, however, 16 different judges have already rejected the Secretary's position. The point of diminishing returns from further judicial review has passed. The Secretary himself persuasively argues that rehashing the merits wastes the courts' time and causes the parties uncertainty and expense, discouraging challenges to unjustified government action. Pet. Br. 21-22. Nonetheless, the Secretary has briefed the merits, and plaintiffs respond below.

The operating subsidy program required the Secretary of HUD to make payments from a reserve fund to owners of Section 236

apartment projects. 12 U.S.C. (1970 ed. & Supp. IV 1974) § 1715z-1(f)(3) & (g).[24] The payments would have offset increases in taxes and utilities, and prevented rent increases. Despite the directives of Congress and the multiple judicial holdings that the Secretary had to make operating subsidy payments, the Secretary refused. He raises here in his support three arguments the courts below have uniformly rejected.

First, the Secretary asserts that the language of the operating subsidy program was discretionary, not mandatory. Second, he argues that Pennsylvania v. Lynn, 501 F.2d 848 (3d Cir. 1974), supports his decision to exercise discretion to refuse to pay any operating subsidies. And third,

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[24]The full text of 12 U.S.C. (Supp. IV 1974) § 1715z-1(f) and (g) is set out in the District Court's decision below on the merits. 414 F.Supp. 526, 529.

he contends that since he did not have sufficient contract authority to implement all housing subsidy programs, he was justified in his decision to choose not to pay any operating subsidies, and to use his contract authority for other programs.

The Secretary's quote of precatory language frcm one phrase in the operating subsidy statute (that the Secretary "is authorized to make, and contract to make" operating subsidy payments) is too selective. The entire statutory scheme provided that ". . . there shall be established an initial operating expense level . . ." (12 U.S.C. (Supp. IV 1974) § 1715z-1(f)(3)) which "shall be established by the Secretary not later than 180 days after August 22, 1974" (12 U.S.C. (Supp. IV 1974) § 1715z-1(g)), that the "project owner shall pay to the Secretary all rental charges collected in excess of the basic rental charges . . . [and that the] excess

charges shall be credited to a reserve fund to be used by the Secretary to make additional [i.e., operating subsidy] payments" (12 U.S.C. (Supp. IV 1974) § 1715z-1(g)). (Emphasis added.)

The initial operating expense level which the statute directed the Secretary to set served no purpose except as a measure of the amount to be paid in operating subsidies. And the reserve fund, into which Congress commanded the Secretary to deposit excess rents, could be used for no purpose except the payment of operating subsidies. Congress would not have used mandatory language to require the collection of funds which could be used only to pay operating subsidies, and also mandated the computation of the amount of such subsidies, if it did not also intend to require the actual payment of the subsidies.

In addition, the legislative history shows that Congress intended to require the Secretary to make operating subsidy payments. In 1974 the Secretary suspended operation of the Section 236 program. Congress responded by enacting the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 672, which continued Section 236 and provided operating subsidies for Section 236 project owners. The Senate Committee on Appropriations commented on the need for this action:

> The Committee is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program.
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> The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals set by the Congress, but by no stretch of the imagination is that correct.
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> The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs. . . . The Department blamed the programs instead of its own

> mismanagement, over 400 indictments have been handed down. . . .

S. Rep. 93-1091 at 6-7; S. Rep. 93-1056, 93rd Cong., 2d Sess. 6-7 (1974).

Despite this admonition, the Secretary refused to implement the newly enacted operating subsidy portion of the Section 236 program. The response of Congress was swift.

> The Committee has concurred with the House in making significant cuts in several of the Department's [HUD] salary and expense accounts. The Committee believes that too often departmental personnel have been used to obstruct rather than carry out directives of the Congress. Examples are . . . the continuing effort to kill the Sections 235 and 236 programs."

S. Rep. 94-326 at 11-12.

In the face of the mandatory language of the statute and the strong action of Congress to compel payment of operating subsidies, the Secretary asserts that his decision to refuse to implement the operating subsidy program was supported by Pennsylvania v. Lynn, 501 F.2d 848.

However, as all of the courts which ruled in operating subsidy cases recognized, Pennsylvania v. Lynn does not support the Secretary. See, e.g., Abrams v. Hills, 547 F.2d 1062, 1068 (9th Cir. 1977) (". . . Lynn is inapposite. To discuss this case is unnecessary. . . .")

In Lynn, the court decided that the Secretary has narrow discretion[25] to refuse to continue a housing program which he put into effect, extensively studied, and reasonably concluded was inherently counter-productive. "There are two questions to be asked. . . . First, was the program consistent in operation with the national housing policies. . . . Second, if it was not, was the inconsistency reasonably attributable to the program's

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[25]"[T]he discretion vested in the Secretary is a narrow one, and the potential for mischief in the event of its abuse great. . . ." 501 F.2d at 862.

structural features as opposed to the manner of its administration?" Pennsylvania v. Lynn, 501 F.2d at 863. But the Secretary cannot show, and never even argued, that the operating subsidy program was inherently inconsistent with national housing policy.

In Lynn the Secretary was allowed to terminate the interest reduction program after an exhaustive study proved the reasonableness of that decision. Id. at 865. Here the Secretary acted without any study of the merits of the operating subsidy program. In Lynn the interest reduction program was found to be inherently counter-productive because, although designed to benefit low income tenants, it instead encouraged landlords to rent to middle income tenants by providing them with higher subsidies. Id. Here the Secretary could not deny that the operating subsidy program would have done what

Congress intended--subsidize increased operating costs--but instead claimed that the program was too narrow and addressed only increased operating costs, ignoring other problems in HUD subsidized housing.[26]

Not only is Pennsylvania v. Lynn distinguishable, but its findings had been repudiated by Congress by the time Underwood was filed. When Congress passed the Housing and Community Development Act of 1974, reviving the Section 236 program, it characterized Lynn's finding that the Section 236 program was inherently counterproductive as a "judicial mistake[] of fact." S. Rep. 93-1091 at 7.

The Secretary's final argument rests on his assertion that he did not have sufficient contract authority to fund all

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[26]The courts below and Congress rejected this rationale as "based on 'policy distaste' not 'factual evidence.'" Dubose v. Hills, 405 F.Supp. 1277, 1290 (D. Conn. 1975).

three subsidy programs that were part of Section 236, and therefore had discretion to pay other kinds of subsidies instead of the operating subsidies. This assertion ignores the fact that when Underwood was filed the reserve fund had tens of millions of dollars in it which could be used only for operating subsidy payments, without the use of any contract authority. "The text of the statute makes no reference whatsoever to contract authority." Abrams v. Hills, 547 F.2d at 1069.

When the Secretary refused to use the reserve fund to make operating subsidy payments, Congress expressed its disagreement and disapproval.

> The Committee was informed that there is approximately $125 million in unused [contract] authority . . . and, in addition, approximately $44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet

implemented this provision of the 1974 Act.

S. Rep. 94-749, 94th Cong., 2d Sess. 10 (1976).

Thus the courts below in all of the operating subsidy cases were correct in uniformly rejecting every argument the Secretary raises here yet again. The Secretary's position was not substantially justified within the meaning of EAJA.

III. SPECIAL FACTORS COMPEL AFFIRMANCE OF THE FEE AWARD IN FULL

The Secretary asserts that even if the government has failed to prove that it was substantially justified, the fee award must nonetheless be reduced to $75 per hour because Underwood raised no special EAJA factors. The Secretary argues that no factor that is ordinarily relevant to setting a lodestar fee can be an EAJA special factor. This position is so extreme that it guts from EAJA the "special factor" language, contrary to Congress'

intent. The Underwood fee award must be upheld in full because the courts below correctly found that the case was unusually difficult, complex and protracted, and that counsel achieved extraordinary success while performing work of the highest calibre. In addition, the trial court correctly found, based on uncontroverted evidence, that the one factor expressly identified in EAJA--the limited availability of other qualified counsel--justified a higher fee award.

A. The Courts May Appropriately Consider Special Factors Such As the Complexity of the Case and the Results Obtained When Determining the Appropriate Amount of the Fee Award

Congress directed that while awards in ordinary EAJA cases should not exceed $75 per hour, higher awards are appropriate if "the court determines that . . . a special factor, such as the limited availability of qualified attorneys . . . justifies a

higher fee." (Emphasis added.) 28 U.S.C. § 2412(d)(2)(A).

Despite the specific directive of EAJA allowing for enhanced awards in the presence of special factors, the Secretary argues that no factor in this case justifies an award in excess of $75 per hour. He also advances an argument which, if adopted, would read out of EAJA the words "a special factor, such as," ensuring that no EAJA case will result in an award in excess of $75 per hour unless the availability of counsel is limited.

> If . . . each of the Kerr [v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976)] and Johnson [v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)] factors--which are, after all, used in calculating fees ab initio under other fee-shifting statutes--is treated as a "special factor" for EAJA purposes, attorneys compensated under EAJA will always receive more than $75 per hour, so long as they would have received more than $75 per hour, had they been compensated under another statute. Indeed, if such an approach is taken, fees will be calculated under EAJA in a manner identical to their computation under fee-shifting

> statutes that do not have an express statutory cap.

Pet. Br. 37-38. (Emphasis in original.)

The Secretary's argument, however, is inconsistent with the language, legislative history and purposes of EAJA. Under his reasoning, no factor ever considered relevant to the setting of fees under other statutes or common law theories can justify exceeding $75 per hour under EAJA. And the Secretary suggests no other "special factors" peculiar to EAJA alone, in effect denying any meaning to Congress' words. But because all of the words of Congress must be given effect, the Secretary's position must be rejected. See, e.g., United States v. Menasche, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v. Ramsdell, 107 U.S. 147, 152, rather than to emasculate an entire section, as the Government's interpretation requires.")

The Secretary's reluctance as a litigant to identify any other special factor that could justify an award in excess of $75 per hour is understandable. However, Congress specified that awards may be based on more than $75 per hour if a case presents special factors, and this Court must determine what Congress had in mind.

Not only the language but the legislative history of EAJA as well suggests that Congress took a much more expansive view of "special factor" than does the Secretary. When Congress selected, and later retained, the words "special factor" in EAJA, it had a body of case law to draw on which gave those words meaning within the attorneys' fees context. Many cases had used those exact or very similar words to describe the factors plaintiffs argue Congress had in mind here--the unattractiveness of the case due to complexity, difficulty and length,

and unusually good work which achieves excellent results. See, e.g., Maceira v. Pagan, 698 F.2d 38, 39 (1st Cir. 1983), describing "unusual quality of representation" as well as contingency and delay as "special factors" under the Landrum-Griffin Act (29 U.S.C. § 411, et seq.); Cantor v. Detroit Edison Co., 86 F.R.D. 752, 760, 769 (E.D. Mich. 1980), citing Northcross v. Memphis Bd. of Ed., 611 F.2d 624 (6th Cir. 1979), for the proposition that an "'unusually unpopular cause'" and contingency are "special factors" under the common fund attorney fee theory; Deown v. Storti, 456 F.Supp. 232, 241 (E.D. Pa. 1978), citing Lindy Bros. Builders, Inc. v. American Radiators & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), 540 F.2d 102 (3d Cir. 1976) (en banc), which identified contingency and quality of counsel's work as "subjective factors"; and Stanford Daily v. Zurcher, 64 F.R.D. 680,

682 (N.D. Cal. 1974), also citing Lindy Bros. for the description of contingency and quality of work as "variable factors."

One must presume that when Congress first enacted EAJA and later revived it, Congress was familiar with judicial interpretation of similar words relating to similar statutes, and intended the words to have the same meaning. "It is always appropriate to assume that our elected representatives . . . know the law." Cannon v. University of Chicago, 414 U.S. at 696-97; Accord Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 379 (1982).

Moreover, when Congress considered the revival of EAJA, it heard testimony that courts had issued EAJA awards for more than $75 per hour based on the special factors of complexity of the suit, the protracted nature of the case, and the provision of work of the highest quality. In response

to a question from Representative Mazzoli who asked whether $75 per hour was sufficient in most cases, one witness testified:

> I think within the confines of the Equal Access to Justice Act, it has worked well, and it has been appropriate. I should add that some courts have awarded fees in excess of $75 per hour in cases where the litigation was complex and protracted and required lawyers of the highest quality. Applying additional factors to the $75 limit makes sense in this context.

Hearing on H.R. 2223, Equal Access to Justice Act Amendments, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st Sess. 53 (1985) (statement of Nan Aron, Director, Alliance for Justice).

Congress was also informed at the same time that the Ninth Circuit had approved a $322,700 fee award in Underwood. Id., Appendix IIB at 89. Congress had the information it needed to disapprove Underwood if it disagreed with the courts below.

The Congress that debated the revival of EAJA in 1984 and 1985 was assessing an

experiment. Congress reviewed in unusual detail the body of law that had developed under EAJA, passing its own judgment on the judgments of the courts. Congressional committees reviewed more than 50 court decisions interpreting EAJA, criticizing in whole or part the reasoning in no fewer than 23 cases.[27] Yet Congress did not express disapproval of a single case in which more than $75 per hour was awarded, did not question the use of the special factors adopted by the Underwood courts and others, did not question the amount of the Underwood award, and did not amend the special factor language in reviving EAJA. "Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts

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[27]H.R. Rep. 98-992 at 7-8, 11, 13-14; S. Rep. 98-586 at 9-12, 14-16, 18, 20-21; H.R. Rep. 99-120 at 9, 11-15, 17-20; H.R. Rep. 99-120, Pt. 2 at 6.

a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978). This is especially true when Congress exhibits both a "detailed knowledge of the [statutory] provisions and their judicial interpretation. . . ." Id. at 581. When Congress revived intact the special factor language of EAJA, it must be presumed to have adopted the use of the special factors that had been identified at that time by the Underwood and other courts. See, e.g., Action on Smoking and Health v. C.A.B., 724 F.2d 211, 218 (D.C. Cir. 1984) (quality of representation, contingency, and delay in payment identified as possible special factors).[28]

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[28]The decisions primarily relied on by the Secretary on the meaning of special factors (Pet. Br. 31)--Vibra-Tech Engineers, Inc. v. United States, 787 F.2d 1416 (10th Cir. 1986) and Chipman v. Secretary of HHS, 781 F.2d 545 (6th Cir. 1986)--were not rendered until after Congress had revived EAJA.

Far from criticizing Underwood or any other case awarding more than $75 per hour,[29] Congress expressed its intent to liberalize EAJA awards. Every amendment to EAJA made the standards for granting fee awards more liberal than they had been under the original Act.[30]

The only criticisms that the committee reports made of judicial decisions were

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[29]Even the Department of Justice, when it listed for the President in 1984 its objections to EAJA, did not mention large awards or awards based on hourly rates in excess of $75 per hour as a problem needing correction during the amendment process. Department of Justice Memorandum Recommending the President Not Approve Legislation Reauthorizing the Equal Access to Justice Act, 42 Fed'l Contracts Report 788-90 (October 29, 1984).

[30]See, e.g., Pub.L. 99-80, 99 Stats. 184 (1985), subsection (d)(2)(B), increasing the net worth of parties who are eligible for EAJA awards, and subsection (d)(1)(B), expanding the definition of "position of the United States" to expressly include the prelitigation agency action that gave rise to the suit.

directed at opinions that construed EAJA too narrowly. See, e.g., H.R. Rep. 99-120 criticizing judicial decisions that equated substantial justification with reasonable justification (id. at 9), rejecting cases that read "position of the United States" too narrowly (id. at 9, 12), disapproving a case that held that EAJA did not apply to agency boards of contract appeals (id. at 15) and rejecting the holding in a case that denied fees if there were no costs (id. at 17). And rather than adopt the view that fee award amounts were overly generous, Congress noted that the cost of EAJA was one percent of its original estimate. Id. at 6.

Congress would have spoken up if it felt that large awards such as the Underwood award were excessive, and would have disavowed the use of the special factors of complexity, difficulty, length of case, high quality work and exceptional success

if it did not intend those criteria to justify awards in excess of $75 per hour. The Secretary's position cannot be reconciled with this legislative history.

Neither can the Secretary's arguments be reconciled with the purposes behind EAJA. EAJA was enacted to encourage the vindication of individual's and businesses' rights, especially in cases that formulate public policy.

> [EAJA] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. . . . The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government

> action and also bear the costs of vindicating their rights.

H.R. Rep. 96-1418 at 10, 1980 EAJA House Hearings 341; accord S. Rep. 98-586 at 6.

Thus EAJA awards must be adequate to induce attorneys to take these policy-setting cases, even on behalf of people who cannot afford to pay them. If EAJA is to be an inducement in any but simple and routine cases, it must be read to offer at least market rate compensation to counsel who take the most difficult, protracted and complex cases, and do the best job possible to achieve extraordinary results. Without such an added inducement, people of limited means who have been treated unfairly by their government will be unable to find counsel. Thus, the language, legislative history and purposes behind EAJA support a construction of the "special factor" language consistent with that employed by the courts below.

The Secretary nonetheless makes two additional arguments. First, he mischaracterizes the holdings below. He asserts that plaintiffs and the Underwood courts take the position that any single factor which would justify a market rate award in excess of $75 per hour under a lodestar analysis justifies exceeding $75 per hour under EAJA. But that is not what the Ninth Circuit held, and that is not plaintiffs' position.

Plaintiffs contend, consistent with the decision below, that the award in excess of $75 per hour was justified under EAJA because this case was especially unattractive to the private bar--here because the litigation was difficult, complex and protracted--and because extraordinary results were achieved due to counsel's exceptional performance, despite

the difficulties of the case.[31] These

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[31] The courts below also determined that the contingent nature of the fee award was a special factor. The Secretary asserts that this factor can never justify an award exceeding $75 per hour in any EAJA case. "If such a contingency adjustment is viewed as compensating the attorney for risks peculiar to the suit . . . it is entirely out of place in EAJA litigation, where fees may be awarded only when the government's position is unreasonable; in such a case, the plaintiff's risk of loss can hardly have been high." Pet. Br. 36, n.16.

The Secretary fails to recognize that in Underwood, however, the risk that fees would not be awarded was high, despite the weakness of the government's argument on the merits. At the time Underwood was filed, and during most of the litigation and settlement, no statute provided for a fee award and the government had a strong argument that sovereign immunity insulated it from an award on any common law theory. See, e.g., Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

In addition, no matter how unreasonable the government's actions may appear at the outset, any experienced attorney must recognize that the chances for defeating the government are considerably lower than 100 percent (the presumption in favor of validity of governmental action alone will reduce the odds). When Congress set the $75 per hour ceiling, it undoubtedly determined that most attorneys would be willing to handle cases against the government, despite the risk of failure, since

(continued...)

factors, by definition, are only applicable to a small minority of all cases, and would not vitiate the $75 per hour limit of EAJA.

Second, the Secretary argues that fees in amounts higher than $75 per hour in

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[31](...continued)
most attorneys are paid by their clients regardless of the outcome of the case. It is reasonable to presume that Congress had in mind such a fixed, noncontingent fee payable in the typical case when it set the $75 per hour cap.

The typical case does not, however, involve a $60 million nationwide class action. Nor does the typical case involve clients who are unable to compensate their attorney regardless of the outcome. By allowing courts to exceed the $75 per hour ceiling where special factors are present, i.e., in difficult non-typical cases in which the client cannot pay, Congress recognized that special inducements are necessary to attract counsel to take these cases. The lower courts' use of this factor is entirely consistent with the language and purpose of EAJA. Contingency is an especially appropriate basis for a fee inducement under EAJA because of its close correlation to limited availability of counsel, discussed infra, section III.B. Thus the addition of contingency to the other special factors in this case strongly militates in favor of affirmance of the full award.

Underwood are precluded by opinions rejecting the use of "multipliers" in such cases as Blum v. Stenson, 465 U.S. 886 (1984) and Pennsylvania v. Delaware Valley Citizens' Council, 107 S.Ct. 3078 (1987). But the Blum and Delaware Valley decisions implicitly recognize that the factors plaintiffs have identified can be given special consideration in an exceptional case if a below market fee award otherwise will not adequately compensate and attract counsel to similar cases.

In Blum this Court expressly recognized that in some cases of exceptional success an enhanced award may be justified. 465 U.S. at 897. And in Delaware Valley, while the Court was split on some issues, all Justices agreed that the touchstone for deciding whether to enhance a fee award was the necessity of attracting counsel in the market to accept similar cases. "[A] fee award should be informed by the statutory

purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting for risk assumption, . . . there should be evidence in the record . . . that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." 107 S.Ct. at 3089 (opinion of White, J., Rehnquist, C.J., Powell and Scalia, J.J., joining). "I would also hold that a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." Id, at 3090-91 (O'Connor, J., concurring in part). "The basic objective for courts to keep in mind in awarding enhancements . . . is that a 'reasonable attorney's fee' should aim to be competitive with the private market. . . . Vindication of the statutory rights passed by Congress depends on the continued availability and

willingness of highly skilled lawyers to take cases for which they will receive a statutory attorney's fee." Id. at 3101 (Blackmun, J., dissenting, Brennan, Marshall and Stevens, J.J., joining).

In this case it was uncontested that the local market rate exceeded $75 per hour. In such a case, this Court's rationale for usually declining to increase fee awards due to unusual complexity, difficulty and duration of the case, as well as exceptional work and success, is inapplicable. That is especially so in the face of Congress' specific direction that "special factors" should be considered in enhancing EAJA awards. Counsel will not be induced to take the most difficult EAJA cases if such special factors are not used to raise the fee award to the market level. It was appropriate for the courts below to take special factors into account.

B. This Case Presented Special Factors Which Justified a Higher Fee Award

An analysis of the Underwood litigation and the factors the courts considered in granting market rate fees underscores that Underwood is the kind of special case which justified entry of an award in excess of $75 per hour.

Underwood is not a typical EAJA case. Run-of-the-mill EAJA litigation challenges the denial of social security disability benefits. The average award under the Act is approximately $4,500, reflecting that counsel has invested relatively little time. Report of the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, September 18, 1986 at 2, Table 1. Underwood, on the other hand, raised novel, difficult and complex issues which required

more than six years and thousands of hours of work to resolve.

While the issue of whether the Secretary was mandated to pay subsidies was not new, the greater part of counsel's work did not address that legal issue, but instead was directed to the nationwide settlement. That settlement was unique. It transferred to counsel the job of distributing millions of dollars of government benefits, requiring the creation and oversight of a specialized private bureaucracy. Yet plaintiffs' counsel succeeded in locating and fairly distributing the multimillion dollar settlement fund despite the failure of the Secretary to fulfill his responsibilities under the settlement.

Notwithstanding the Secretary's characterization of Underwood as a simple case, the District Court judge who spent years overseeing the mechanics of the settlement and the work of counsel was in

the best position to evaluate the case. He wrote:

> This case involved the largest class action settlement fund--$60 million--ever administered by legal aid counsel. After a nationwide search, about $45 million was distributed to more than 145,000 eligible poor persons. The overall plan of administration required counsel to develop a unique formula for distribution of funds, to create effective and fair claims processing procedures, to institute complex fraud control systems, to launch an extensive media campaign to locate class members, and to carry out other programs, all tailored especially for this case.

Underwood Memorandum and Order Granting . . . Attorneys' Fees, Petition for Writ of Certiorari 14a, 16a (hereinafter "Pet. for Writ __"). Counsel displayed "tireless dedication and devotion in managing this protracted litigation and in administering its complex settlement agreement. Its work was of the highest calibre." Pet. for Writ at 17a. The District Court's judgment on these points must be respected.

Therefore the fee award must be affirmed in full on the basis of the special factors discussed above.

C. The District Court Did Not Abuse its Discretion by Finding that the Limited Availability of Qualified Counsel Justified the Fees Awarded.

The courts below correctly found that the one special factor expressly identified in EAJA--limited availability of qualified attorneys--justified the award in this case.

The Secretary asserts that this special factor exists only when "'appropriately specialized legal services cannot be obtained in the market for $75 [an hour] or less,'" quoting Vibra-Tech Engineers, Inc. v. United States, 787 F.2d at 1420. Pet. Br. 32. The Secretary then suggests that since plaintiffs' counsel did not have a particular expertise necessary to the prosecution of this suit, and did not show that other qualified attorneys would not

have accepted the case for $75 per hour, the Underwood award must be reversed.

Contrary to the Secretary's assertion that plaintiffs' counsel did not have special qualifications, the District Court judge noted that in his experience, "there are a limited number of attorneys--maybe we are looking at a group of about five percent of the Bar--who have the ability and the qualifications to handle a massive matter such as this." R.T., October 14, 1982 at 31.

Moreover, the Secretary has lost sight of the focus of Congress' words--limited availability--and the realities of this case. In Vibra-Tech, plaintiffs had paid the attorneys at rates in excess of $75 per hour. The Court of Appeals reduced the District Court's fee award to $75 per hour since the parties had failed to show that they could not have hired other counsel for $75. Thus the Vibra-Tech inquiry (whether

legal services could be obtained in the market for $75 per hour) is relevant only if plaintiff has $75 per hour to spend.

The Underwood plaintiffs, however, were indigents who could not pay their attorneys, and when their suit was filed no statute provided a fee award at any rate. Plaintiffs presented uncontroverted evidence that virtually no other attorneys, regardless of qualifications, would have accepted their case on a pro bono basis.[32] Thus the relevant question to ask about the availability of counsel in Underwood is:

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[32]Uncontested declarations established that: There were only two major pro bono referral programs with the capacity to place major litigation with Los Angeles County law firms; most of the attorneys who agreed to represent indigents could work only 50 hours per year on those cases; and the pro bono referring agencies could successfully refer to private counsel no more than one case the magnitude of Underwood every two years. Declarations of Charles F. Palmer, Cheryl White Mason, and Terry Friedman. Ninth Cir. Supp. Ex. Rec. 61, 68 and 74, C.R. 439, 441 and 443.

Who would have represented a nationwide class of indigents against an unjustified government agency in a case which appeared likely to be fought through appeal as a test case on the agency's discretion, if there were no prospect for compensation? In short, the availability of attorneys for this case was not just "limited"; it was practically non-existent.

Because in this case practically all conceivable special factors converge--limited availability of counsel, the novelty, difficulty and protracted nature of the case, the high quality of counsel's work, exceptional results, and contingency-- the full award in Underwood should be affirmed.[33]

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[33]The award should be disturbed only if its entry was an abuse of discretion or it was based on clearly erroneous findings. City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 2693 (plurality opinion), 2700 (Powell, J., concurring) (1986). If the courts below committed errors of law which call the award into question, the

(continued...)

CONCLUSION

The resolution of this case will send a message to those attorneys whom Congress intended to induce to represent people confronted with unjustified government action. If fees are denied or the special factors of the case are not recognized, the message to the bar will be: Do not represent the poor, middle income people, or small businesses against an unjustified government if it appears that the case may be difficult and protracted. Especially do not represent people who are in litigation with an agency that is using the case as a vehicle to change the law. And do not persevere unless you can afford to work for years for little or nothing, eventually to be rewarded by a below-market fee.

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[33](...continued)
case should be remanded for additional findings consistent with this Court's opinion on the law. Pullman-Standard v. Swint, 456 U.S. 273, 390-91 (1982).

Yet these long and complex cases against the government are the ones most in need of counsel, for they are the cases that set or implement national policy. If counsel are to be induced to accept more Underwood type cases, the Underwood award must stand in full. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

By _____
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October 6, 1987

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CERTIFICATE OF SERVICE

I, MARY S. BURDICK, a member of the Bar of this Court, HEREBY CERTIFY that on October 7, 1987, true and correct copies of the BRIEF FOR THE RESPONDENTS were mailed, pursuant to Rule 28, Rules of the Supreme Court of the United States, by depositing same in the United States mailbox, postage prepaid, to the following parties:

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REPLY

BRIEF

Supreme Court, U.S.
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CLERK

No. 86-1512

In the Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute our basic proposition: that EAJA disputes should, where possible, be resolved by looking to objective indicia that the government's position was (or was not) justified. They do take issue with our statement of the applicable EAJA standard, however, and argue vigorously that there are no indicia of reasonableness in this case. They also insist that the factors used to compute attorney's fees under *other* fee-shifting statutes that lack a statutory cap may be applied under EAJA. In our view, these contentions cannot be reconciled with EAJA's language and legislative history, with this Court's opinions, and with the Court's common-sense attempt to discourage wasteful attorneys' fee litigation.

1. a. As we explain in our opening brief (at 14-15), when the Equal Access to Justice Act (EAJA) was originally enacted in 1980, Congress made it abundantly clear that the government was to be found "substantially justified" when its position was reasonable. The Conference Report on EAJA (H.R. Rep. 96-1434, 96th Cong.

2d Sess. 22 (1980)) stated flatly that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact"; the House and Senate Committee Reports articulated an identical standard. See H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10 (1980); S. Rep. 96-253, 96th Cong., 1st Sess. 6 (1979); Gov't Br. 14-16. Eleven courts of appeals that considered the meaning of the 1980 Act agreed that the test imposed by EAJA was one of reasonableness (Gov't Br. 16-17). When Congress reenacted EAJA in 1985, it made a number of minor modifications to the Act. But it deliberately chose *not* to modify the substantial justification standard. Thus, "substantially justified" means today what it meant in 1980: "reasonableness in law and fact."[1]

Respondents *agree* that no change in the meaning of the substantial justification test was intended in 1985 (Resp. Br. 26). They nevertheless deny that the government passes the "substantially justified" test if its position is "reasonable." Instead, respondents claim that the statutory language requires the government to pay

[1] Several amici argue that the substantial justification question is reviewable only under an abuse of discretion standard. As the majority of courts to decide the issue have held, however, where—as here—an appellate court is "determining the reasonableness of legal arguments," review is de novo. Boudin v. *Thomas*, 732 F.2d 1107, 1117 (2d Cir. 1984); see also *Spencer* v. *NLRB*, 712 F.2d 539, 563 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984) (judgement as to whether government's interpretation of law is "plausible or colorable" is within the special expertise of appellate courts and therefore *de novo* review is appropriate); *Dubose* v. *Pierce*, 761 F.2d 913, 917 (2d Cir. 1985), petition for cert. pending, No. 85-516; *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1496 (11th Cir. 1986); but see *Underwood*, Pet. App. 8a. Moreover, contrary to the apparent suggestion of amicus Battles Farm (Br. 9, 12), such a standard does not favor either side in EAJA litigation, but rather promotes consistency and predictability in such litigation. See *Spencer*, 712 F.2d at 563-564.

attorneys' fees unless it can offer a "strong showing of justification" for its position (*id.* at 2).[2]

In support of this revisionist interpretation, respondents note (Br. 21-24) that both the House and the Senate Committees, in adopting the substantial justification test, rejected an alternative standard proposed by the Department of Justice. This alternative, which was drawn from the leading case concerning awards to prevailing defendants under the Civil Rights Act of 1964, *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), would have imposed the burden on the private party to show that the government's action was "arbitrary, frivolous, unreasonable, or groundless." Respondents appear to suggest that because the Justice Department proposal included the word "unreasonable," and because the proposal was rejected, Congress necessarily rejected a standard based on reasonableness. But there is no suggestion in the House or Senate Reports that either Committee had such a conclusion in mind. To the contrary, the proposed standard was understood to incorporate a "frivolousness," rather than a

[2] To some extent, respondents' argument plays on the word "substantial." In ordinary usage, "substantial" often means that which is "abundant," "plentiful" or "considerable in amount, value or worth." *Webster's Third New International Dictionary* 2280 (1976) (definition 2)). But in its legal signification, "substantial" generally connotes something "soundly based" or "carrying weight" (*id.* (definition 3b)). For example, the phrase "substantial evidence" has long been understood to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). Similarly, Fed. Rule Civ. P. 37(a)(4) and (b)(2), which imposes sanctions against a party who resists discovery unless the resistance was "substantially justified," is satisfied "if reasonable people could differ as to [the appropriateness of the contested action]." *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982). See Gov't Br. 15 n.6. Congress was clearly drawing upon this established legal meaning of "substantial" when it adopted the phrase "substantially justified."

"reasonableness," test (see 125 Cong. Rec. 21435 (1979) (noting that prevailing defendants under *Christiansburg* must demonstrate that the plaintiff's action was "completely without foundation")). Moreover, the Reports indicate that the proposal was rejected primarily because it put the burden of proof on the private party rather than the government. H.R. Rep. 96-1418, *supra*, at 14.

Respondents also note (Br. 24) that the Senate Judiciary Committee voted down an amendment that would have changed "substantially justified" to "reasonably justified." The Senate Report, however, contains no explanation for the Committee's vote. Since that same Report (S. Rep. 96-253, *supra*, at 6) states unequivocally that "[t]he test of whether or not a Government action is substantially justified is essentially one of reasonableness," it is odd, to say the least, to construe this vote as a rejection of a reasonableness standard. That is particularly true since, as we have explained, the House and Conference Reports articulate the same standard. A more credible explanation for the Senate's action is that the change was rejected because the Committee understood that the substantial justification formulation *already* incorporated a standard of reasonableness, making the amendment unnecesary.[3]

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[3] When Senator DeConcini was asked about the Senate Committee vote during testimony before the House Committee, he offered two explanations for rejection of the "reasonably justified" amendment. First, he indicated that the "substantially justified" test would be easier to define, because "[t]hese are terms that have been defined or attempted to be defined by various courts in decisions." *Award of Attorney's Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 38 (1980). Second, he indicated in response to a question that "reasonably justified" might be a "lesser standard" than "substantially justified" (*ibid.*). In making this statement, however, Senator DeConcini was speaking only for himself, not his fellow Committee members, and his comment appears in an impromptu answer to a question at a committee hearing. On other more formal occasions, Senator DeConcini clearly equated the substantial justification language with a reasonableness test. For example, in explaining the substantial justification test to his colleagues on the Senate floor, the Senator said (125 Cong. Rec. 21435 (1979) (emphasis added)):

> [W]e chose * * * language which had precedent in rule 37 of the rules of civil procedure. This standard has the benefit of some definition in the case law. More importantly, it places the burden on the Government to justify its actions in order to defeat an award. It is therefore strong enough to encourage people to vindicate their rights. At the same time, it protects the Government when its case, though not prevailing, *has a reasonable basis in law and fact*.

b. Some of the amici take a different tack, suggesting that although "substantial justification" may have meant "reasonableness" in 1980, its meaning changed when Congress reenacted EAJA in 1985. This change came about, they argue, not because Congress amended the statutory language, but because "Congress clarified [the] legislative history" (Small Bus. Foundation Amicus Br. at 11). Specifically, they point to the 1985 House Report discussed in our opening brief (at 16-18). But Congress—or in this case, one chamber of Congress—cannot amend a statutory standard by "clarifying" legislative history. See *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984); *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 117-118 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). It is "the intent of the Congress that enacted [the provison] * * * that controls" (*International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977))—an intent that is unequivocally established by the 1980 Committee Reports. If Congress wanted to change the established meaning of substantial justification in 1985, it had a simple expedient for doing so: it could have amended the statutory language as part of the general revision and reauthorization of EAJA. The

fact that Congress chose not to amend the statutory language is the best evidence that no change in meaning was intended.[4]

c. Moving beyond questions about the applicable standard, respondents agree (Br. 29-30) that EAJA should generally be implemented, if at all possible, by looking to objective indicators of substantial justification. They identify (Br. 30) three factors that may be considered as bearing on whether the government's position is substantially justified: prior judicial treatment of the issue in the case, the ease with which the case was resolved, and the nature of any settlement. As Congress has indicated (see H.R. Conf. Rep. 96-1434, *supra,* at 22), these factors certainly are relevant. But there plainly are other objective factors that can serve as shorthand indicators of the reasonableness (or unreasonableness) of the government's position. For example, if the government litigates an issue and eventually loses in this Court by a vote of 5-4 (see, *e.g., League of Women Voters* v. *FCC,* 798 F.2d 1255, 1260 (9th Cir. 1986)), the fact that four Justices believed the government's position to be not only justified but correct should be regarded as conclusive evidence of reasonableness. We doubt respondents would deny that, in such a case, there is no reason to rehash the merits of the claim to determine the existence of substantial justification.

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[4] In any event, the 1985 House Report is itself internally inconsistent. In discussing the statutory phrase "position of the United States," for example, the Report states: "If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed 'reasonable' litigation positions; thereby having the effect of substantially justifying their position." H.R. Rep. 99-120, 99th Cong., 1st Sess. Pt. I, at 12 (1985). This language certainly suggests that some authors of the Report believed that a reasonable position is substantially justified within the meaning of EAJA.

Respondents do assert, however (Br. 34, 37-38), that objective indicators of reasonableness are relevant only if they existed at the outset of the litigation. We agree that the ultimate question to be resolved in this case is whether the government was substantially justified in taking the position that it did when the litigation began. But we do not agree, nor do we think that respondents seriously maintain, that corroborative *evidence* of reasonableness arising after the outset of the litigation—including possible objective indicators of reasonableness—may not be considered by courts in answering this question.

If courts could not look to evidence that accumulates after the litigation commences in determining whether the government was substantially justified, EAJA would produce bizarre results. For example, if the government lost in three district courts and filed appeals, then lost in a fourth district court and did not appeal, the government might be liable for attorneys' fees in the fourth case even if it subsequently prevailed in every court of appeals. Alternatively, if the government won a unanimous judgment in the court of appeals, and then lost 5-4 in the Supreme Court, the fact that seven Justices and judges voted in its favor could not be considered in determining whether its initial decision to litigate was substantially justified. This is certainly not what Congress had in mind when it cautioned that EAJA should not be applied so as to penalize the government for "advancing in good faith a credible, though novel, rule of law." H.R. Rep. 96-1418, *supra*, at 14.

Nor do we think that respondents are serious when they suggest that objective indicators of reasonableness must be assessed as of the time the litigation was instituted. Indeed, two of the relevant factors urged by respondents—a decision on the pleadings and a decision by the government to settle the case on terms favorable to the nongovernmental party—do not, by definition, exist at the outset of the litigation. Thus, respondents implicitly

acknowledge that courts may look to events that occur after the institution of litigation in determining whether the government was substantially justified.[5]

d. Given the relevance of objective indicators of reasonableness, the dispositive question in this case is whether this Court's stay of the district court's injunction pending review by the court of appeals, and its grant of certiorari in two related cases, should be regarded as such indicators. As we have explained at length in our opening brief (at 22-26), the issuance of those orders necessarily required a determination by this Court that the government had a substantial likelihood of success in the operating subsidy litigation.

Respondents argue (Br. 34) that a stay should not be considered in determining whether the government was substantially justified because a stay is "not a ruling on the merits." But EAJA does not look to whether the government has prevailed or lost on the merits; it asks whether the government's position was "substantially justified."[6] The grant of a stay reflects this Court's (at least preliminary) determination that the government's position has merit, and respondents have offered no reason why such a determination is not highly probative in the unique context of an inquiry into whether the government was "substantially justified."

[5] Closing off the inquiry at the time the complaint was filed would be particularly inappropriate in this case. Respondents repeatedly stress that the Secretary had lost on the operating subsidy issue in nine district courts at the time the litigation in this case was instituted. But these decisions were rendered in rapid succession, one following the other. The leading district court decisions were being actively challenged by the Secretary on appeal, and no appellate court had yet ruled that the Secretary was required to implement the operating subsidy program. In such circumstances it is not sufficient simply to tote up adverse district court decisions to determine whether the government's position was "substantially justified." Indeed, as this Court recognized in *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984), "government litigation frequently involves legal questions of substantial public importance," and the law benefits "from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." For this reason, several courts have recognized that the government is "substantially justified" when it litigates an issue that has not been resolved within a particular circuit even if the government has lost in other circuits. See *Cornella* v. *Schweiker*, 741 F.2d 170, 172 & n.3 (8th Cir. 1984) (invoking *Mendoza*); *Wolverton* v. *Heckler*, 726 F.2d 580, 583-584 (9th Cir. 1984); *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984).

Respondents further contend (Br. 38) that it is not clear that this Court gave any consideration to the merits in granting the stay in 1976, or at the very least that the applicable standards for granting stays were then in "flux." As demonstrated in our opening brief, however (at 22-23), this assertion is incorrect. Moreover, as we have explained (Gov't Br. 23) (and as respondents do not deny), a related prerequisite to the grant of a stay—the requirement that the applicant demonstrate a reasonable probability that four Justices will vote to grant certiorari—itself "reflects the policy in favor of granting a stay only when the losing party presents substantial contentions which are likely to prevail on the merits" (*Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1311 (1973) (Marshall, J., in chambers)). Indeed, it is hard to imagine how it could be otherwise, for "there is no good reason for allowing a stay of the judgment below if it is certain to be affirmed, even if the case is worthy of Supreme Court review because of a conflict or the public importance of the question presented." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 694 (6th ed. 1986).

[6] A stay is especially strong evidence that the government was substantially justified, for during the time when the stay is in effect the government is not only *substantially* justified, it is justified *as a matter of law* in continuing to pursue the course of action being challenged in the litigation. If as a matter of law the government is conclusively justified in pursuing a course of action during one phase of the litigation, it is quite odd to say that it was not even substantially justified in pursuing this action at the outset of the litigation.

Respondents are similarly incorrect in disputing the relevance to the EAJA inquiry of this Court's grant of certiorari in *Harris* v. *Ross*, 431 U.S. 928 (1977), and *Harris* v. *Abrams*, 431 U.S. 928 (1977). Respondents suggest that it is entirely a matter of speculation whether the Court would have affirmed or reversed after it heard all the arguments on the merits. This is, of course, correct, but again it misses the point. The question is not whether the government would have ultimately prevailed on the merits, but whether the government's position was substantially justified. And in the absence of a conflict in the circuits, it hardly seems likely that the Court would have granted certiorari unless the government's position in the operating subsidy cases was at least highly plausible. In fact, every action taken by the Court in the operating subsidy litigation—the grant of a stay in *Underwood* (429 U.S. 892), the refusal to vacate the Second Circuit's stay in *Dubose* (429 U.S. 1085 (1977)), the grant of certiorari in *Ross* and *Abrams* (431 U.S. 928 (1977)) and the refusal to vacate the *Underwood* stay (434 U.S. 993 (1977))—supports the view that the Secretary's position was, at the very minimum, reasonable. And if one grants that the Court's orders in the operating subsidy litigation necessarily embodied such a conclusion, then respondents have not even attempted to explain why these orders should not be dispositive of the question whether the government was substantially justified.

e. While we believe that this Court's orders in the operating subsidy litigation should dispose of this case, we take particular issue with respondents' argument (Br. 53-54) that the Secretary's position was not substantially justified because HUD settled the case on terms favorable to them. We recognize that such a settlement may have some relevance in some cases. But as the Second Circuit stated in *Dubose*, 761 F.2d at 920, "[a] litigation position that was justified, for EAJA purposes, before a settlement

should not later lose its justification as a result of the settlement." See also *Trident Construction, Inc.* v. *District Engineer*, 766 F.2d 974 (6th Cir. 1985); *Bailey* v. *United States*, 721 F.2d 357 (Fed. Cir. 1983). Moreover, settlements must be viewed cautiously as evidence of unreasonableness, since in some cases—as in this one—"policy reasons quite apart from the merits of the dispute may, in the last analysis, dictate a premature termination of the litigation." *Dubose*, 761 F.2d at 920. Here, the decision to settle was taken shortly after Congress enacted legislation prospectively eliminating the Secretary's discretion not to implement the subsidy program, and after a new Administration was elected to office. See Gov't Br. 26-27 n.13. As this Court recognized in *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) "the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to resolution of a particular issue."[7]

f. Finally, respondents move beyond objective indicators to argue that HUD's position on the merits had no reasonable basis, notwithstanding the fact that the then-recent decision in *Pennsylvania* v. *Lynn*, 501 F.2d 848 (D.C. Cir. 1974), offered "the only judicial guidance available" when the Secretary made her operating subsidy decision, and "the government relied on arguments similar to those which had succeeded in *Lynn*." *Dubose*, 761 F.2d at 918; see also Gov't Br. 27-29. Respondents' contention that the Secretary was unreasonable in relying on *Penn-*

[7] In addition, respondents and amici refuse to acknowledge the potentially chilling effect of their proposed rule on settlements. But as the *Dubose* court recognized, "[a] holding that an agency's decision to settle an appeal on terms favorable to the claimant undercuts that agency's justification of its litigation position would discourage future settlements." 761 F.2d at 920; cf. Fed. R. Evid. 408.

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sylvania v. *Lynn* is misguided. As we explain in our opening brief, the court in *Lynn* concluded that where a housing subsidy program is couched in nonmandatory language, and where the Secretary finds that implementation of the program would interfere with other housing goals, the Secretary may suspend the program. Here, the operating subsidy program was framed in the same statutory language as that at issue in *Lynn*, and the Secretary concluded, after a thorough review of the program, that the operating subsidy program would not advance the nation's housing goals. Instead, the Secretary chose to devote HUD's limited resources to another subsidy program—the interest reduction program—in order to increase housing production for low income families. This course was entirely consistent with *Lynn*.

Respondents contend (Br. 64) that the Secretary could have made operating subsidy payments out of her so-called "reserve fund." But 12 U.S.C. (1976 ed.) 1715z-1(g) stated that the reserve fund was available for operating subsidy payments only "[d]uring any period that the Secretary determine[d] that the balance in the reserve fund [was] adequate to meet the estimated additional assistance payments." And the Secretary determined that the reserve fund was *inadequate* to finance the operating subsidy program. See Stay Application No. A-259 (1976 Term), Apps. F and G. Consequently, the Secretary reasonably believed that HUD had statutory authority not to implement the program. Futhermore, the Secretary's view that congressional release of contract authority was required to use money in the reserve fund maintained the traditional distinction between legislative authorizations and appropriations, and provided for congressional control over the expenditure of federal funds. See *Train* v. *City of New York*, 420 U.S. 35, 39 n.2 (1975). In short, the Secretary reasonably believed, on the basis of *Lynn*, the language of the statute, and the failure of Congress to authorize sufficient contract authority, that HUD had discretion not to implement the program.[8]

2. a. Respondents also take issue with our analysis of when a departure from EAJA's $75-per-hour limit is permissible (an analysis that, of course, the Court need not reach if it concludes that the government was substantially justified in the operating subsidy litigation). They contend that factors such as the market rate (see Resp. Br. 78), the difficulty and complexity of the case (Resp. Br. 79), the results obtained (Resp. Br. 79-80), and the contingent nature of the fee award (Resp. Br. 80-81 n.31) are "special factor[s]" within the meaning of EAJA that justify an increased fee. But respondents do not (and cannot) contest our observation (see Gov't Br. 35) that these are the very factors that are used to calculate fees under statutes that do not contain an express cap. Respondents therefore make no attempt to answer our argument that use of these factors in EAJA litigation will read the

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[8] It should be noted that during the period 1975-1977 the operating subsidy program was in a state of flux. Although respondents and amici stress that the reserve fund was initially earmarked for the operating subsidy program, they neglect to mention that in 1976 Congress made the reserve fund available for use in other housing programs (including the interest reduction program), thereby buttressing the Secretary's view that she had discretion to allocate HUD's limited resources to programs other than the operating subsidy program. See Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1977, Pub. L. No. 94-378, Tit. I, 90 Stat. 1095, 1096. The same provision also indicated that—as the Secretary had contended—contract authority was required to utilize the reserve fund. *Ibid.* Indeed, the legislative history to the 1977 amendments states that Congress sought to "clarify" the Secretary's obligations under the 1974 Act. H.R. Conf. Rep. 95-634, 95th Cong., 1st Sess. 62-63 (1977). Had the Secretary's obligations under the 1974 Act not been ambiguous, to say the least, "clarification" would not have been necessary.

$75-per-hour cap out of the statute.[9] That manifestly could not have been Congress's intent when it placed the cap in EAJA in 1981 and reenacted it in 1985. Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (because of sovereign immunity, statutes awarding attorneys' fees against the United States to be narrowly construed).[10]

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[9] Respondents assert (Br. 79-81) that their formula will lead to fee awards in excess of $75 per hour only in "a small minority" of cases that are "especially unattractive to the private bar." But respondents offer no rationale for using their "special" factors in some cases and not in others. Of course, we agree with respondents' suggestion (see Resp. Br. 78) that an increase in the EAJA fee may be proper when necessary to attract qualified counsel. But unless the party seeking fees demonstrates that such an increase is necessary, there is no justification for a departure from the statutory cap.

[10] Contrary to the assertion of respondents and amici, review of recent case law discloses extensive use of "special factors" by district courts across the country to increase EAJA attorneys' fees awards above $75 per hour. See, *e.g.*, *United States* v. *Ottati & Goss, Inc.*, No. 80-225-L (D.N.H. Sept. 2, 1987) (awards of $125 an hour for two attorneys, $110 an hour for one attorney); *Kreie* v. *HHS*, No. 84-1761 (D. Kan. Aug. 25, 1987), appeal pending (10th Cir.) ($120 an hour award); *Louisiana* v. *Lee*, Civ. No. 83-6126 (E.D. La. Aug. 10, 1987) ($125 an hour award); *Carlson* v. *Bowen*, Civ. No. 5-81-124 (D. Minn. Aug. 3, 1987), appeal pending (8th Cir.) ($150 an hour award); *Avant* v. *Bowen*, No. S-84-0924 (E.D. Cal. July 20, 1987) ($100 an hour award, $95.25 for cost of living, rest for special factors); *Threewit* v. *Bowen*, No. S-83-1138 (E.D. Cal. July 15, 1987) (same); *Jimenez* v. *Bowen*, No. 85-5285 (E.D. Pa. July 1, 1987) ($110 to $145 an hour); *Fields* v. *Bowen*, No. S-84-1666 (E.D. Cal. June 18, 1987) (same as *Avant*); *City of Brunswick* v. *United States*, 661 F.Supp. 1431 (S.D. Ga. 1987), appeal pending (11th Cir.) ($125 an hour award); *Oregon Natural Resources Council* v. *Dep't of Transportation*, Civ. No. 86-572-JU (D. Or. May 5, 1987) (awards of $125 an hour for one attorney, $100 an hour for another); *Viktoria-Schaefer Int'l* v. *U.S. Dep't of Army*, 659 F. Supp. 85 (D.D.C. 1987), appeal pending (D.C. Cir.) ($80, $90 and $125 an hour awards for cost of living and special factors); *Mullaney* v. *Bowen*, No. 85-1202 (M.D. Fla. Mar. 5, 1987) appeal pending (11th Cir.) ($100 an hour award); *Henderson* v. *Bowen*, No. S-84-0011EJG (E.D. Cal. Feb. 2, 1987), appeal pending, No. 87-1859 (9th Cir.) (same); *Weber* v. *Weinberger*, 651 F. Supp. 1379, 1391-1392 (W.D. Mich. 1987), appeal pending, No. 87-1553 (6th Cir.) ($120 an hour award).

b. Respondents point to one bit of asserted statutory support for their argument: they note that Section 2412(d)(2)(A)(ii) (emphasis added) provides for a fee in excess of $75 per hour when there is a special factor in the case "*such as* the limited availability of qualified attorneys for the proceedings involved." While Congress thus identified only one EAJA special factor—the limited availability of qualified attorneys—respondents evidently reason that the qualifier "such as" means that Congress intended to authorize use of *all* the factors that are considered in setting reasonable hourly fees under other fee-shifting statutes.

In fact, however, the choice is not, as respondents would have it, between permitting district courts to consider every conceivable factor in setting EAJA hourly fees on the one hand, and reading the qualifier "such as" out of the statute on the other. Congress spelled out two conditions that would permit an exception to the $75-per-hour cap: (1) "an increase in the cost of living," and (2) "the limited availability of qualified attorneys for the proceedings involved." Both conditions point to objective circumstances prevailing in the marketplace. The first concerns general changes in price levels brought about by inflation. The second concerns differences in relative prices for legal services brought about by a shortage of attorneys having certain specialized skills. Neither EAJA nor its legislative history suggest that Congress intended courts to go beyond these sorts of market factors to look to subjective qualities that are unique to individual cases, such as how complex or difficult the case turned out to be, how uncertain success appeared at the outset of the litiga-

tion, or how ably or industriously counsel performed. Cf. *Pennsylvania* v. *Delaware Valley Citizens' Council*, No. 85-5 (June 26, 1987 (O'Connor, J., concurring in part and concurring in judgment)).

In the absence of more specific guidance from the statute or the legislative history, then, the most reasonable construction of EAJA is that courts should adhere to the $75-per-hour cap unless:

(1) there has been an increase in the cost of living since 1985; (2) the issues in the case require specialized legal skills that command a premium in the marketplace; or (3) some other special factor applicable to this class of cases, analogous to a shortage of attorneys having specialized skills, demonstrates that qualified counsel cannot be obtained at established market rates.[11] What EAJA does not permit, however, is upward adjustments in the hourly fee based on a court's post hoc assessment of subjective factors unique to each particular case. If courts can consider all special factors enumerated in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976), and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), then the $75-per-hour maximum imposed by Congress will effectively become a minimum.

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[11] For example, suppose the cost of living has increased by 15 per cent, the market rate for legal services in the community has increased to $100, and the market rate for patent attorneys in the community is $120. In a patent case, EAJA would permit the $75 cap to be increased to $82.50 to reflect the higher cost of living, and would permit a further increase to $102.50 to reflect the premium necessary to attract patent attorneys. But EAJA would not permit an increase to $120. Such an increase would nullify the congressional judgment to impose a uniform $75 cap on attorneys' fees, and to make adjustments in that rate based on changes in the cost of living, rather than increases in the general market rate for attorneys' services from one community to the next.

c. Respondents contend that they are entitled to an award of fees in excess of the $75-per-hour limit by the one special factor specifically identified in the statute, the "limited availability of qualified attorneys." But respondents introduced no evidence in the district court, and have pointed to nothing in the record, to establish that they could not have secured competent counsel at market rates. Respondents do argue that they could not in fact have paid their counsel anything and that they accordingly depended upon legal services attorneys (see Br. 90). This assertion, however, is beside the point: the relevant question for EAJA purposes is whether the suit requires specialized legal services unavailable at market rates. If the party seeking fees fails to carry its burden on this point (a failure that respondents evidently concede, see Br. 88-89), an upward adjustment to the fee is inappropriate. See, *e.g.*, *Action on Smoking and Health* v. *CAB*, 724 F.2d 211, 217 (D.C. Cir. 1984); *Vibra-Tech Engineers* v. *United States*, 787 F.2d 1416, 1420 (10th Cir. 1986). Surely, just as a fee award may not be reduced because the prevailing party is represented by a legal services organization (see *Blum* v. *Stenson*, 465 U.S. 886 (1984)), so a fee may not be enhanced merely because the prevailing party is represented by such an organization.[12]

Nor can respondents claim that they provided unique services that would command a premium in the legal marketplace. As the *Dubose* district court held in denying fees in excess of the $75-per-hour limit, "an unusually high degree of legal talent was not required in this case." *Dubose* v. *Pierce*, 579 F. Supp. 937, 953 (D. Conn. 1984),

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[12] As the House Report observed, "[t]he fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act." H.R. Rep. 96-1418, *supra*, at 15.

rev'd on other grounds, 761 F.2d 913 (2d Cir. 1985), petition for cert. pending, No. 85-516. Indeed, by their own admission (see Resp. Br. 86), the vast bulk of hours expended by respondents' attorneys was for administrative rather than legal work – supervising the distribution of the settlement fund by an accounting firm. While we do not doubt the dedication of respondents' counsel or their effectiveness in supervising the settlement (see Resp. Br. 87), respondents have offered no reason to believe that their counsel are unique.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed. Alternatively, the fee award should be vacated and remanded for reconsideration in light of EAJA's $75-per-hour cap.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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BRIEF

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

SAMUEL R. PIERCE JR., Secretary of
Housing and Urban Development,
Petitioner

v.

MYRNA UNDERWOOD, et al.

On Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS, AMERICAN CIVIL LIBERTIES UNION, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, ALLIANCE FOR JUSTICE, PUBLIC COUNSEL AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

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1 S. Childress and M. Davis, Standards of Review (1986) ... 31, 34

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 86-1512

SAMUEL R. PIERCE, JR.,
Secretary of Housing
and Urban Development, Petitioner

v.

MYRNA UNDERWOOD, et al.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AMICI CURIAE SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS, AMERICAN CIVIL LIBERTIES UNION, ACLU FOUNDATION OF SOUTHERN CALIFORNIA, ALLIANCE FOR JUSTICE, PUBLIC COUNSEL AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

INTEREST OF AMICI 1/

This brief is submitted on behalf of the San Francisco Lawyers' Committee

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1/ Letters consenting to the filing of this Brief have been lodged with the Clerk of this Court.

for Urban Affairs, the American Civil Liberties Union, the ACLU Foundation of Southern California, Alliance for Justice, Public Counsel and the Mexican American Legal Defense and Educational Fund, amici curiae.

Amici San Francisco Lawyers' Committee for Urban Affairs, American Civil Liberties Union, the ACLU Foundation of Southern California, Public Counsel and the Mexican American Legal Defense and Educational Fund are public interest law organizations that have substantial experience in the litigation of civil rights cases subject to various statutes providing for awards of attorney's fees, including the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. We have been involved in many cases, either as counsel for parties or as amicus curiae, which have

established basic standards for awarding fees.2/

The Alliance for Justice is a national association of public interest law organizations. Its members who join in the filing of this Amici brief are typical of the public interest law firms that may be affected by the Court's decision in this case.3/ These public

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2/ E.g., Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Hutto v. Finney, 437 U.S. 678 (1978); Hoang Ha v. Schweiker, 707 F.2d 1104 (9th Cir. 1983); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

3/ Members of the Alliance for Justice include Business and Professional People for the Public Interest, Center for Law and Social Policy, the Center for Law and the Public Interest, the Center for Public Representation, the Center for Science and the Public Interest, Consumers Union, Education Law Center,

(footnote cont'd on next page)

interest law firms provide legal representation to a wide variety of clients including Black and Native Americans, poor persons, consumers, women, children and persons institutionalized in mental health facilities. Many of the clients now served by these public interest attorneys are members of groups that have traditionally lacked the resources

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Employment Law Center, Equal Rights Advocates, Food Research and Action Center, Harmon and Weiss Institute for Public Representation, Juvenile Law Center of Philadelphia, Mental Health Law Project, National Education Association, NOW Legal Defense and Education Fund, National Wildlife Federation, National Women's Law Center, Native American Rights Fund, Natural Resources Defense Council, New York Lawyers for the Public Interest, Public Advocates, Inc., Roisman Reno & Cavanaugh, Sierra Club Legal Defense Fund, Women's Law Project, Women's Legal Defense Fund, Advocates for the Public Interest, and Children's Defense Fund.

to obtain representation to vindicate their legal rights.

Our interest in the issues presented by this case is twofold. First, we depend on donated services of attorneys in the private bar to assist us in conducting litigation. In our experience, the potential for fee awards to prevailing parties in such litigation has increased the willingness of the private bar to participate in actions brought by or against the federal government. To the extent that fees and costs become unavailable even when the party receiving pro bono representation prevails, the availability of donated services will decrease.

Second, we also depend to a substantial degree on fee awards for income necessary to carry out, through our own staff, our programs of providing legal services to the victims of

unjustified governmental action. Thus, the availability of fee awards is essential both to the continued provision of legal services and to the vindication of individual rights in the face of unjustified conduct by the United States government.

We are convinced that the judgment of the court below is correct. The legislative history of the Equal Access to Justice Act demonstrates that Congress intended that the statute be liberally interpreted so that fees will be awarded in all appropriate cases. Moreover, that same legislative history, as well as sound policy concerning the administration of justice, counsel that fee awards should not be disturbed on appeal absent an abuse of discretion.

SUMMARY OF ARGUMENT

The express legislative purpose of the Equal Access to Justice Act ("EAJA")

is to ensure that awards of attorney's fees be available to those who are required to challenge or defend against the unjustified actions of the United States government. When Congress reenacted the legislation in 1985, it noted that far fewer awards were being made under the Act than had been anticipated when EAJA was first enacted in 1980. In order to correct various judicial misinterpretations of EAJA which had resulted in its restrictive application, Congress clarified various provisions of the Act so that they would be interpreted in the expansive manner Congress had originally intended. In addition, Congress amended the Act in several significant respects so as to expand its coverage. Accordingly, in order to further the intent of Congress, EAJA should be interpreted liberally.

Congress further recognized that a fee award determination would have to be made on a case-by-case basis because the district court is in the best position to apply the inherently imprecise standards of EAJA to the unique legal and factual issues that comprise a particular dispute. Considerations of the sound administration of justice also dictate that the district court is best positioned to decide the EAJA issues. Accordingly, the decision to award attorney's fees under EAJA should be left to the discretion of the trial court and should be disturbed on appeal only where there has been a significant abuse of that discretion. As the court of appeals correctly concluded, the judgment of the district court in Underwood should therefore be affirmed.

ARGUMENT

I. THE REENACTMENT OF THE EQUAL ACCESS TO JUSTICE ACT EVIDENCES CONGRESS' INTENT THAT THE PROVISIONS OF THE ACT BE LIBERALLY INTERPRETED.

A. Congress' Avowed Purpose Was to Ensure More Awards Were Made.

When Congress set out to extend and improve the Equal Access to Justice Act ("EAJA"), it began by discussing the "problem" in the Act's prior implementation: the amount of attorney's fees that had been awarded thus far. H.R. Rep. No. 120, 99th Cong., 1st Sess. 9-10 (1985) (hereinafter "H.R. Rep. No. 99-120"). But rather than complaining that fee awards were unwarranted or excessive, Congress viewed the problem as the paucity of awards:

> [A]wards are dramatically less than the $100 million annual cost estimated by the

> Congressional Office (CBO) in 1981 and higher amounts predicted by the Justice Department.

Id. at 10 (emphasis supplied). Only 1% of the $100 million annual cost predicted by the CBO had been expended. S. Rep. No. 586, 98th Cong., 2d Sess. 6 (1984) (hereinafter "S. Rep. No. 98-586").

Congress attributed part of the problem in the under-utilization of EAJA to agency and judicial misconstruction of the Act. H.R. Rep. No. 99-120 at 10. Congress criticized those decisions which had assisted the government in avoiding its rightful liability for fees by interpreting the Act too narrowly. Id. at 9-11. Indeed, the only criticisms that the committee reports made of any judicial decisions were directed at those opinions which

construed EAJA to impede recovery under the Act. Id.

Congress expressly reaffirmed the primary purpose of the Act as ensuring that individuals, associations and other organizations would not be deterred from seeking review of, or defending against governmental action because of the expense involved in securing the vindication of their rights. H.R. Rep. No. 99-120 at 4; S. Rep. No. 98-586 at 5. The Secretary contends, however, that Congress had a second, equally important purpose, more consonant with the Secretary's argument that the Act should be interpreted restrictively. He asserts that Congress did not want the prospect of liability for fees to "chill public officials" from enforcing the law, and implies that when Congress extended EAJA in 1985 it believed such a result might occur if challenges to

other than "unreasonable" government action were permitted. (Pet. Br. at 14).

The Secretary's position is not supported by the legislative history. It is true that at the time of EAJA's original enactment, a question was raised as to whether fee awards would impact federal government enforcement activities. A number of public interest organizations, including amicus Alliance for Justice, opposed the proposed legislation because they feared that the federal government would be deterred from enforcing rights it was charged with protecting, such as those under OSHA and Title VII, by the specter of attorney's fees awards sought by the defendant employers and businesses. Award of Attorney's Fees Against the Federal Government: Hearings on S.265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of

Justice of the House Committee on the Judiciary, 96th Cong., 2d Sess. 78-79 (1980) (hereinafter "1980 Hearings") (Statement of Mary Frances Derfner, Director, Attorneys' Fees Project, Lawyers' Committee for Civil Rights Under Law, on Behalf of Lawyers' Committee on Civil Rights Under Law and American Civil Liberties Union); Id. at 85 (Statement of Nan Aron, Director, Council for Public Interest Law).

EAJA was enacted on an experimental basis, and one of the revelations of the trial period was that the fears concerning the discouraging effect of fee awards proved to be unfounded: Awards were uniformly sought not by the targets of enforcement actions brought by the government to vindicate individuals' federal rights, but by claimants and plaintiffs seeking fees for private enforcement of their rights

which the government had unjustifiably denied. Previous opponents, such as amicus Alliance for Justice, became enthusiastic supporters of the reenactment of EAJA. H.R. Rep. No. 99-120 at 6-7. The legislative history of the reenactment is completely devoid of any expressions of "concern" by any witnesses about squelching federal enforcement.

In the language quoted by the Secretary, Congress noted that concerns had been expressed in the past about a "chill" and it reaffirmed its support of federal enforcement, particularly in areas where federal statutory rights "cannot be privately enforced." H.R. Rep 99-120 at 10. But there is no indication whatsoever that -- in the face of all the evidence to the contrary -- Congress believed that the availability of fee awards would

discourage government enforcement. Nor is there any support for the Secretary's position that Congress was motivated by any such belief as it interpreted and clarified the expansive intent of the Act. Nothing contradicts the fact that Congress' paramount purpose in the reenactment was to correct the problem of insufficient awards under EAJA.

B. Congress Evidenced Its Intent For More Awards Through Interpretation and Amendment.

In order to clarify its intention and to insure that further restrictive misinterpretations of the Act did not frustrate its purpose, Congress took several tacks. In some cases, Congress stated the proper interpretation of existing statutory language. In others, it adopted clarifying language. And in still other instances, Congress enacted new provisions to broaden the coverage

of the Act.4/ Each time, Congress sought to extend rather than to restrict the availability of fee awards under the Act.

1. "Substantial Justification."

As respondents demon trate in their brief, when EAJA was first enacted, Congress rejected the Justice Department's proposal that fees be awarded only when government action was "unreasonable" as an unduly restrictive

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4/ "In addition to the specific statutory language changes the committee desired to make a number of further clarifications which did not entail changing the actual language of the law." S. Rep. No. 586, 98th Cong., 2d Sess. 7 (1984). The House Committee stated that the purpose of the bill was to "make[_] clarifying technical and substantive amendments; and make[_] the Act as so amended, permanent." H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985); Id. at 5 (The bill "will provide clarification and other improvements in the Act to ensure that awards are made in appropriate proceedings and cases.").

standard. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 and 14 (1980); See also 1980 Hearings at 26-27 (Statement of Sen. DeConcini). When Congress debated the reenactment of EAJA, it reconfirmed its original intent.

> Because in 1980 Congress rejected a standard of "reasonably justified" in favor of "substantially justified," the test must be more than mere reasonableness.

H.R. Rep. No. 99-120 at 9. Moreover, Congress specifically criticized court decisions that had interpreted "substantial justification" as merely "reasonable justification." Id. Thus, while the Secretary is correct that Congress did not intend to change the meaning of the statutory language on "substantial justification" which it reenacted in unaltered form (See Pet. Br. at 17), Congress did intend to "reaffirm" and "clarify" its original

intent and to prevent misinterpretations of the meaning of the provision from continuing to occur in the future.5/

2. Amount of Fees.

When Congress considered the reenactment of EAJA, it was aware of Underwood and of other cases like it where courts had found special factors supporting the award of fees at rates

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5/ The Secretary contends that, because the term "substantial justification" is not susceptible of being more precisely articulated, it should be given the broadest possible interpretation. (Pet. Br. at 19). Congress itself may have tacitly acknowledged that the term was incapable of more specific definition when, though condemning judicial misconstructions, it did not amend the Act as it did, for example, with respect to the definition of the "position of the United States" which must be substantially justified. See infra. It does not follow, however, that this Court should therefore adopt a watered-down definition, when the meaning which serves the purpose of the Act and express Congressional intent can be fleshed-out in the course of the application of "substantial justification" in each case.

exceeding $75 per hour. Equal Access to Justice Act Amendments, Hearing on H.R. 2223 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 99th Cong., 1st Sess., at 53-54 (1985) (Testimony of Ms. Aron and Mr. Stewart). Congress had every opportunity to complain that the courts were entering awards at excessive rates and needed to be curbed without delay. However, Congress did not amend the Act to eliminate enhanced awards based on special factors or otherwise indicate that courts should interpret EAJA to make it more difficult to recover fees at rates greater than $75 per hour. Moreover, Congress registered its intention to the contrary.

The Congressional Budget Office cost estimate incorporated into the

House Report noted that the average award in routine cases was estimated to be about $6,000. H.R. Rep. No. 99-120, Part 2, 99th Cong. 1st Sess., at 3 (1985). It acknowledged, however, that it expected that some "unusually large awards would be made" in "special circumstances". Id. Thus Congress reaffirmed its intention that in atypical cases special factors would result in much higher than average awards.

Congress' provision for awards above the standard rate reflects its understanding that such awards are necessary in certain circumstances in order to effect the primary purpose of the Act, i.e., to insure that individuals, associations and other organizations are not deterred from seeking review of or defending against governmental action because of the

expense involved. Precisely where, as here, the government has a great monetary incentive for improper action, the expense involved in opposing that improper action will be correspondingly great. Precisely where, as here, the expense is greatest, the need for recovery of that expense will be the most urgent, if review is not to be deterred in violation of Congress's intent.

3. Additional Clarification and Amendment.

The Committee noted several other areas of confusion in EAJA and, without changing the language of the Act, offered clarification so that courts would no longer misconstrue certain provisions. H.R. Rep. No. 99-120 at 9-11. Together with the clarification of its original intent under the Act, Congress made substantive amendments to

the language of the statute which also worked to facilitate the awarding of fees. All of these clarifications of intent and amendments served to improve the chances that fee awards under EAJA would be made more often and more expeditiously than had been the case under interpretations of the lapsed provisions.

In one noteworthy clarification of its intent under the 1980 Act, Congress confirmed that the EAJA applies to Social Security administrative hearings in which the Secretary of Health and Human Services is represented by counsel. H.R. Rep. No. 99-120 at 10. As a general rule, the Secretary is not represented by counsel, and the Committee acknowledged that in those situations, fees under the EAJA are not available. However, Congress reasserted its understanding that the Act covers

all situations in which the United States is represented by counsel, including certain Social Security administrative hearings. Id.

Amendments to the Act also served to liberalize the coverage so that fees would be available to more parties and under more circumstances. For example, Congress expanded the list of parties eligible for fee awards to include units of local government. H.R. Rep. No. 99-120, at 10. Congress also raised the net worth limitations enabling a larger number of parties to qualify for fee awards. Id. An amendment also expanded the jurisdiction of agency boards in contract appeals, expressly providing that they could award attorney's fees under the Act. Congress specifically overruled the decision to the contrary of the Federal Circuit in Fidelity Construction Co. v.

United States, 700 F.2d 1379 (Fed. Cir. 1983). H.R. Rep. No. 99-120 at 15.

In yet another amendment, Congress expanded the nature and scope of the review of the denial of fee applications by administrative agencies. H.R. Rep. No. 99-120 at 16. Congress had provided in the original enactment for appeals by claimants of an agency's adverse ruling on a fee application. The standard for review of the denial of a fee award was changed by the amendment from an abuse of discretion standard to the more critical standard of 'substantial evidence' in the record of the agency.6/ Id; 5 U.S.C. § 706. The

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6/ Congress also provided that the record for EAJA fee determination purposes by the agency will be the record of the agency on the merits. 5 U.S.C. § 504 (a)(1). A parallel provision was enacted for court determinations. 28 U.S.C. § 2412 (d)(1)(B).

amendment thus grants to the judiciary greater power to rectify the incorrect denial of a fee application. The government itself was never given parallel authority to appeal an initial agency award of fees under any standard. Congress' apparent objective initially, and even more in 1985, has been to create an asymmetric system where the courts provide greater protection for private parties than for the government.

Additional amendments clarified several definitions in the Act, making them, in every instance, more inclusive: the term "civil action brought by or against the United States" was clarified to include judicial review of agency actions, including government contract disputes; the term "court" was clarified to include the U.S. Claims Court; the term "final judgment" was

clarified to mean a judgment that was final and not appealable, and Congress provided that a fee application could be filed before a final judgment. H.R. Rep. No. 99-120 at 17-18. Congress expressly disapproved of the "overly technical" approach to the interpretation of "final judgment" adopted by the Ninth Circuit in Auke Bay Concerned Citizens' Advisory Council v. Marsh, 755 F.2d 717 (9th Cir. 1985) (withdrawn). H.R. Rep. No. 99-120 at 18 n. 26.

In another amendment, Congress expanded the scope of the Act to include eminent domain proceedings, and clarified the standard for an award of fees in condemnation actions. H.R. Rep. No. 99-120 at 18-19. Further amendments authorized payment of interest in fee awards, and clarified that a fee award may be available under EAJA, even where

costs are not awarded. H.R. Rep. No. 99-120 at 17. The position of the Ninth Circuit in Tulalip Tribes of Washington v. Federal Energy Regulatory Commission, 749 F.2d 1367 (9th Cir. 1984), holding that fees would not be awarded under the EAJA where an award of costs was barred by another statute, was expressly rejected. Id. Congress also specifically provided that the Act apply retroactively to cases which were pending during the period that the Act had lapsed. H.R. Rep. No. 99-120 at 21.

Yet another significant amendment to the Act clarified the section which provided that attorney's fees would be awarded unless the "position of the United States" was substantially justified. Congress explicitly defined "position" to mean not merely the arguments made by the government in the adversary adjudication but the

government's underlying action or failure to act that formed the basis for the adjudication. 28 U.S.C. § 2412(d); H.R. Rep. 99-120 at 12. In doing so, Congress rejected the limited interpretation of "position" adopted by some courts.

> This restrictive view, adopted by several courts of appeal has resulted in the denial of a number of meritorious fee claims, because it fails to focus attention on the unjustified government activity that formed the basis of the litigation.

Id. In condemning the restrictive view and adopting the broadest definition of the proper scope of an EAJA proceeding, Congress was acting "consistent with the original Congressional intent and the underlying purposes of the statute." Id.

Thus, the entire legislative history, instead of demonstrating concern about judicial excesses, evidences that Congress saw the problem

as unjustifiable judicial restrictiveness in interpreting EAJA. Rather than considering that EAJA was stretched beyond its appropriate reach, Congress concluded that more areas of improper government action should be deterred by the prospect of fee awards. Far from eliminating or restricting access to awards, Congress clarified and changed EAJA to make it easier to recover attorney's fees. The Ninth Circuit holdings regarding substantial justification and the presence of special factors are totally concordant with Congress' affirmation of a liberal construction of the Act. The legislative record is replete with examples that Congress intends this Court to interpret the provisions of EAJA expansively and in favor of ensuring that its incentives to deter improper government action remain strong and unmistakable.

II. THE DECISION BELOW SHOULD BE UPHELD BECAUSE IT WAS WELL WITHIN THE EXERCISE OF THE COURT'S DISCRETION.

In reviewing a lower court decision, an important and often determinative threshold decision is what level of review should be applied. This Court should hold that an abuse of discretion standard should be applied in reviewing the decision of the district court concerning an attorney's fees award under EAJA, as the Ninth Circuit Court of Appeals correctly did in Underwood. The district court is in the best position to apply the inherently imprecise legal standards of EAJA to the necessarily unique complex of facts and legal issues that constitute a particular underlying dispute. The inquiry of the reviewing court should be limited to ascertaining that the fee decision of the court below is not

predicated on improper considerations and is not unreasonable. To apply a less deferential standard of review would fuel endless appeals over EAJA fees, in direct contradiction to this Court's general policy that fee litigation be simplified and to Congress' specific intent in EAJA.

A. Abuse of Discretion Is the Correct Standard of Review

Traditionally the choice of the standard of review has turned upon whether the underlying issue is considered one of "fact"7/, "law"8/ or

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7/ The "clearly erroneous" standard of review is applied to "factual determinations" such as damages (including the existence of injury, underlying factors, mitigation, and apportionment of fault, as well as the calculation of amount) 1 S. Childress and M. Davis, Standards of Review, § 2.22 Damages, and cases cited at n. 78 (1986); the determination of negligence and causation in tort (including the application of the legal standard of

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"discretion"9/. Defining differences between the categories, however, has

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reasonableness to facts to determine the conclusion of legal liability), McAllister v. United States, 348 U.S. 19 (1954); and racial discrimination, Anderson v. City of Bessemer City, 470 U.S. 564 (1985). Under this standard, reversal is permitted only if the court below applied an erroneous legal standard and the record permits only one resolution under the correct standard, or if "the reviewing court is left with the definite and firm conviction on the entire record that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Otherwise an affirmance or remand is required.

8/ The "de novo" standard of review is applied to legal issues and permits the reviewing court to reverse an erroneous conclusion of law; the court need not make "an original appraisal of all the evidence." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 n. 31 (1984).

9/ The "abuse of discretion" standard of review is applied to situations where the court below must exercise discretion in reaching a decision, such as in acceptance of settlements in class actions,

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Evans v. Jeff D., 475 U.S. 717, 106 S. Ct. 1531, 1545 (1986) (district court has discretion to "appraise the reasonableness of particular class action settlements on a case-by-case basis in light of all the relevant circumstances"); issuance of preliminary injunction, Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion."); exercise of pendant jurisdiction, United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966) (the power to hear pendant claims "need not be exercised in every case in which it is found to exist" since "pendant jurisdiction is a doctrine of discretion . . . ."); and attorney's fees, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (the Court "reemphasize[d] that the district court has discretion in determining the amount of a fee award"). Reversal is permitted under this standard only if the court below has made a clear error in the process of exercising its discretion or has reached a judgment that is unreasonable. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981)(where the judge "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.").

proven to be difficult and elusive. See generally 1 S. Childress and M. Davis Standards of Review § 1.1 (1986). The distinction between questions of fact and questions of law has never been clear-cut, as this Court has frequently noted. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). And while what is being reviewed differs between exercises of discretion and factual determinations -- the process of applying judgment is not the same as that of determining truth -- the level of deference afforded is very similar. See, e.g. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Because of the difficulty of drawing clear lines when there are mixed questions of law and fact or areas for the exercise of judgment, this Court

recently has taken a functional approach to determining the appropriate standard of review in a particular situation. In Miller v. Fenton, 474 U.S. 104, 114 (1985), Justice O'Connor, writing for a near unanimous Court, stated the following:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Id. When as here the issues involve neither "a pristine legal standard" nor "a simple historical fact," the proper inquiry is what level of review is required by the sound administration of justice.

The Miller case involved a habeas corpus petition and concerned the

appropriate standard to be used by a federal court in reviewing a state court finding on the voluntariness of a confession when a federal statute explicitly provides that state court findings of fact are presumed correct. In light of the constitutional rights at stake and longstanding precedent favoring appellate de novo review on this matter, the Court determined that the sound administration of justice required independent federal review. The nature of the issues in the instant case, however, compel the opposite conclusion.

Justice O'Connor considered four principal factors in reaching her conclusion in Miller: (1) stare decisis concerns; (2) congressional guidance; (3) the nature of the inquiry; and (4) practical considerations, including perceived shortcomings in the position

of the trier of fact. 104 U.S. at 115-117. Consideration of these factors in the context of the EAJA issues now before the Court strongly favors a deferential standard of review regarding lower court judgments.

Unlike some areas of constitutional fact and law, principles of stare decisis do not weigh in favor of plenary appellate review of decisions concerning fee awards under EAJA. While EAJA fee issues have not previously been considered by this Court, attorney's fees matters in other related contexts have been the subject of review. In those cases, this Court has consistently indicated that determinations of the district court concerning entitlement and amount of fees should not be overturned unless they are clearly erroneous or constitute an abuse of discretion. Hensley v. Eckerhart, 461

U.S. 424, 437 (1983) ("reemphasiz[ing] that the district court has discretion in determining the amount of a fee award"); Blum v. Stenson, 465 U.S. 886, 896, 902 n. 19 (1984) (reviewing whether an upward adjustment in a fee award by the district court was an abuse of discretion); Evans v. Jeff D., 475 U.S. 717, 106 S.Ct. 1531, 1545 (1986) (reviewing whether determination by the district court concerning a waiver of a fee award constituted abuse of its discretion); City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686 (1986) (reviewing under the abuse of discretion standard whether the district court correctly applied factors for calculating a fee award).10/ Indeed, in

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10/ See also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (holding that a district court's determination under Fed. R. Civ.

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City of Riverside, Justice Powell, concurring, found the district court's award unreasonable "on its face," but nevertheless held that affirmance was required because the district court's findings were not clearly erroneous, citing Anderson v. City of Bessemer City, supra. Id. at 2699. For this Court to hold that the lower court's judgment should be deferred to, therefore, breaks no new ground.11/

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P. 37(a)(4) as to whether a party may escape sanctioning or payment of a fee award because his position is "substantially justified" must be reviewed under the abuse of discretion standard). Legislative history indicates that the EAJA standard of "substantial justification" was derived from language in Rule 37. H.R. Rep. 1418, 96th Cong., 2d Sess. 13, 18 (1980).

11/ A number of circuit court decisions recognize that the lower court's determination of "substantial justification" and amount of fees under EAJA should not be reversed unless it

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Most significantly, there is here unambiguous expression of Congressional intent in favor of lower court discretion. In a key House Report, Congress stated that

> [T]he Committee expects that the determination of what is "substantially justified" will be decided on a <u>case-by-case</u> basis due to the wide variety of factual contexts and legal issues which make up government disputes.

H.R. Rep. No. 99-120, at 10 (emphasis supplied). The substantial justification test is thus an area where Congress expected lower courts to exercise

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constitutes an abuse of discretion or is clearly erroneous. <u>International Woodworkers Local 3-98</u> v. <u>Donovan</u>, 792 F.2d 762 (9th Cir. 1986); <u>Wyoming Wildlife Federation</u> v. <u>United States</u>, 792 F.2d 981 (10th Cir. 1986); <u>Bazaldua</u> v. <u>United States Immigration and Natualization Service</u>, 776 F.2d 1266 (5th Cir. 1985); <u>Ferrell</u> v. <u>Pierce</u>, 743 F.2d 454 (7th Cir. 1984); <u>Ramos</u> v. <u>Haig</u>, 716 F.2d 471 (7th Cir. 1983); <u>Matthews</u> v. <u>United States</u>, 713 F.2d 677 (11th Cir. 1983).

individual judgment. The only mention of appellate review appears in criticisms of decisions which, contrary to Congressional intent, aided the government to escape the liability envisioned by Congress. See Section I, supra. There is no suggestion in the legislative record that Congress favored plenary appellate court review on a regular basis.

Even if Congress had not spoken so directly, it is apparent that the nature of the inquiry here is such that repeated independent appellate consideration could not be expected to provide significant analytic assistance. The terms "substantial justification" and "special factors such as . . ." are inherently imprecise; their application to the complex of myriad facts and legal principles concerning the underlying dispute, the market for attorneys, and

the degree of contingency of the challenge to the government's position is necessarily unique in each instance. While a certain degree of refinement and delineation will occur under the abuse of discretion standard, no substantially greater gain in consistency can realistically be expected from de novo appellate reconsideration of the issues.

Finally, practical considerations governing the choice of review standard also dictate deferring to the lower court's discretion. There are no competing concerns of the lower court which might interfere with its ability to judge the fee issue fairly and impartially. Rather, the trial court is especially competent to judge the EAJA issues of substantial justification and special factors which involve typical trial court determinations of reasonableness in the light of all the

relevant circumstances of the case. Evans v. Jeff D., 106 S.Ct. at 1545.12/

Furthermore, as the Secretary points out, this Court "has repeatedly attempted to discourage labor-intensive litigation" by simplifying attorney's fees litigation. (Pet. Br. at 21). See e.g. Hensley v. Eckerhart, 461 U.S. at 437, quoted with approval in Blum v. Stenson, 465 U.S. at 902, n. 19 ("[A] request for attorney's fees should not result in a second major litigation.").

12/ As one appellate court reasoned in affirming the denial of an attorney's fee award under Rule 37:

> Evaluation of the degree of justification of the party's motion, and of the circumstances rendering an award of expenses just or unjust, is committed to the sound discretion of the district court, which has a greater opportunity to observe and assess the character of the parties' litigating postures.

In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 680 (D.C. Cir. 1981) (emphasis added).

The abuse of discretion standard of review advances this policy. Blum v. Stenson, supra. Holding that district court decisions may be disturbed on appeal only in those cases where either a clear error has been made in the process of arriving at the decision, e.g., by considering impermissible factors, or the determination reached is simply arbitrary, will discourage unnecessary appeals and limit the burden on appeals which are taken. De novo appellate review, on the other hand, would institute a pattern of diminishing returns, as courts further and further away from a full comprehension of the merits would have to rehash them in an attempt to regrade the strength of the government's losing argument, and courts removed from the climate of the market would reconsider fee enhancement. Thus, all the factors relevant to a

determination of the appropriate level of review compel the conclusion that the sound administration of justice is best served by a deferential standard of review of lower court determinations concerning the EAJA issues of "substantial justification" and special factors regarding enhancement of an award.

B. The Court of Appeals Correctly Determined that the District Court Did Not Abuse Its Discretion

As Respondents demonstrate, the Court of Appeals correctly determined that the district court did not abuse its discretion when it found that the Secretary's position was not substantially justified. The three objective indicators mentioned approvingly by Congress -- persistence in arguing a position which has been rejected in court, resolution of the

case on the pleadings, and the terms of any settlement13/ -- here are each consonant with a judgment that the Secretary lacked substantial justification for his position. A number of other factors also support the trial court's decision, e.g. the merits of the underlying legal dispute. If this Court should decide, however, that despite the fact that stays and grants of certiorari are not prior court actions which can be evaluated at the outset of the dispute and are not rulings on the merits, they should nevertheless be factors considered in the determination of a fee award under EAJA, this Court should remand the case to the district court to add those factors into its calculus.

13/ H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980); H.R. Rep. No. 1434, 96th Cong., 2d Sess. 22 (1980).

Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982).

The Court of Appeals also correctly determined that the district court did not abuse its discretion by awarding fees at a rate above $75 per hour. Special factors such as the limited availability of qualified attorneys, specified in the Act, and the unusual difficulty, complexity, length, quality of work and extent of success all comport with a judgment by the district court that an award in excess of $75 was appropriate. If this Court should nevertheless determine that any of the special circumstances should not have been part of the district court's decision-making process or that additional factors should have been considered, it should remand for the district court's calculation of a proper

fee amount. Hensley v. Eckerhart, 461 U.S. 429, 440 (1983).

CONCLUSION

As public interest law organizations whose clients are dependent on the availability of fee awards to attract pro bono representation and to support the staff programs which provide legal services to the victims of unjustified government action, we urge this Court to give full effect to Congress' expansive intent in EAJA by upholding the Underwood award in toto and affirming the judgment of the court of appeals.

Dated: 10-7, 1987

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BRIEF

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No. 86-1512

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

MYRNA UNDERWOOD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR VERNICE DUBOSE, ET AL., AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

This brief as *amicus curiae* is submitted on behalf of Vernice Dubose, et al., petitioners in *Dubose v. Pierce*, petition for *cert.* pending, No. 85-516, with the written consent of both parties. Letters consenting to the filing of this brief have been filed in the office of the Clerk.

On their merits, both *Dubose v. Pierce* and this case resulted in the successful enforcement by lower income tenants of the operating subsidy program mandated by 12 U.S.C. § 1715z-1(f)(3) and (g). *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Underwood v. Hills*, 414 F. Supp. 526 (D. D.C. 1976).

Later, plaintiffs in both cases were awarded substantial attorneys' fees authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412. *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1984); *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982). HUD filed appeals in both fee cases, prevailing in *Dubose*, but not in *Underwood*. *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985); *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985).

Petitions for *certiorari* were filed in both cases. *Dubose v. Pierce*, No. 85-516; *Pierce v. Underwood*, No. 86-512. In *Dubose*, petitioners noted, *inter alia*, the critical disagreement between the Second and Ninth Circuits on whether HUD's position on the merits was "substantially justified" in cases involving virtually identical issues of law and fact which were resolved together in a nationwide settlement.

The petitioners in *Dubose* contended that the Second and Ninth Circuits used different sets of standards to determine whether HUD's position on the merits was "substantially justified:"

> For example, the *Underwood* court of appeals held that 'We review, for an abuse of discretion, the district court's determination that the government's

position was not substantially justified.' *Underwood v. Pierce, supra*, 761 F.2d 1346. Appendix III, p. 181. The Second Circuit, on the other hand, held that . . . 'the district court's determination that HUD's position was not plausible should be viewed as a conclusion of law . . . and subject to *de novo* review.' *Dubose v. Pierce, supra*, 761 F.2d 917. Appendix I, p. 11.
Dubose v. Pierce, No. 85-516, petition for writ of *certiorari*, p. 9.

It is noteworthy that the petitioner has not raised this particular issue on this appeal, implicitly conceding application of an improper standard of review by the Second Circuit.

Amicus petitioned this Court to grant a writ of *certiorari* to resolve this conflict between the circuits and insure nationally consistent standards for determining the crucial EAJA issue of whether governmental action is substantially justified. HUD's petition for a writ of *certiorari* in this case was similarly based upon ". . . this disagreement between the Second and Ninth Circuits . . ." *Pierce v. Underwood*, No. 86-1512, petition for writ of *certiorari*, p. 8.

On or about May 15, 1987, this Court met to consider the *certiorari* petitions in *Pierce* and *Dubose* among other cases. The petition in *Pierce* was granted. No action was taken on *Dubose*.

Dubose v. Pierce is closely related to *Pierce v. Underwood*. The petitioners in the *Dubose* case file this brief as *amicus curiae* in support of the respondents in this case to help protect their interests in *Dubose v. Pierce*.

This brief is limited to argument on only two points raised by HUD regarding only the first of the two general issues on appeal, *i.e.*, whether the government was "substantially justified" within the meaning of the EAJA in litigating its position on the merits.

SUMMARY OF ARGUMENT

1. In refusing to implement the operating subsidy mandated by Congress, HUD relied exclusively on the then-recent decision of the District of Columbia Circuit, *Pennsylvania v. Lynn*, 501 F.2d 848 (1974). HUD continues to cite that case to support its decision to refuse to pay any operating subsidies.

In *Pennsylvania v. Lynn*, the court of appeals approved HUD's exercise of discretion to suspend two housing construction programs, including Section 236 for which the operating subsidies were later intended. But the court refused to permit HUD to suspend operation of the rent supplement subsidy to owners and tenants of existing Section 236 projects.

The rent supplement was directly analogous to the operating subsidy at issue on the merits of this case. The construction programs were not. The case on which HUD relied provided no support for the agency's decision to refuse to pay operating subsidies mandated by Congress. Instead, it sent the agency a clear message to the contrary. HUD's position lacked substantial justification from the very onset of the series of operating subsidy cases that preceded this one.

2. HUD contends that as a matter of law EAJA fees can never be awarded in a case in which the government *eventually* obtains a stay of the decision on the merits or a writ of *certiorari* from this Court. *Amicus* disagrees with this claim, but will leave argument against its validity to the respondents.

In determining whether a position taken by the government is substantially justified a court must consider the government's perspective as the case(s) develop. Given the number of federal court decisions against its position in this litigation, at some time prior to the initial stay in this case HUD should have abandoned its efforts against the operating subsidy. Given its perspective as loser of many cases, HUD was not substantially justified in carrying on.

ARGUMENT

HUD WAS NOT SUBSTANTIALLY JUSTIFIED.

Amicus agrees with HUD that EAJA cases should be resolved by reliance on objective criteria whenever possible. As respondents will argue, in this case all objective criteria set forth by Congress show that HUD's position was not substantially justified. Nevertheless, the test of substantial justification necessarily requires some evaluation of the merits. The following selected points militate against HUD's position that its argument on the merits was substantially justified.

A. The Only Caselaw On Which HUD Relied In Refusing To Implement The Operating Subsidy Program Held Against HUD's Position In This Litigation.

HUD claims its ". . . position was reasonable as an initial matter." Brief for the Petitioner, p. 27. "The Secretary's conclusion drew compelling support from a then-recent decision of the District of Columbia Circuit, *Pennsylvania v. Lynn*, 501 F.2d 848 (1974)." Brief for the Petitioner, p. 28. In *Dubose v. Pierce*, 761 F.2d 913, 918 (2d Cir. 1985), reversing an award of attorneys' fees to *amicus*, the Second Circuit agreed with HUD:

> At the time the underlying action was filed, the D.C. Circuit's conclusion in *Lynn*, the only judicial guidance available, offered no hint of the ultimate outcome of the subsequent cases. In preparing its litigation stance the government relied on arguments similar to those which had succeeded in *Lynn*.

The Second Circuit erred. In *Pennsylvania v. Lynn*, the D.C. Court of Appeals approved the Secretary of HUD's exercise of discretion to suspend two housing construction programs, including Section 236. Most significantly, however, the court rejected HUD's attempt to fully suspend the Section 101 rent supplement program created by 12 U.S.C. § 1701s. Its function was to subsidize the rents of certain lower income residents of federally subsidized housing including that developed under the Section 236 program.

Holding that ". . . the discretion vested in the Secretary is a narrow one and the potential for mischief in the event of its abuse great, . . .," *Lynn, supra*, at 862, the court upheld the Section 236 construction suspension because a HUD study factually demonstrated that the program in operation was not achieving Congressional objectives. The court found HUD's suspension necessary to effectuate Congressional goals.

The *Lynn* court correctly reasoned that "[d]iscerning Congress' intent to bestow or withhold discretion to suspend the programs is not a simple matter of tallying the 'shalls' and 'mays' and finding that the 'mays' have it." *Pennsylvania v. Lynn, supra*, 501 F.2d 854.

The D.C. Circuit sustained only the Secretary's "narrow" discretion to suspend housing *construction* programs where those "programs" had come into conflict with the overall housing policy or the program goals set by Congress and ". . . administrative correctives within [HUD's] power to take have not or will not resolve the conflict . . . ." Pennsylvania v. Lynn, supra, 501 F.2d 856. The court recognized, however, that the Secretary had no discretion to ignore a duly enacted and funded program ". . . for reasons of policy . . . extrinsic to [its] operation . . . ." *Pennsylvania v. Lynn, supra*, 501 F.2d 852.

The D.C. court upheld HUD's suspension of Section 236 construction only after HUD demonstrated that the program *as it was then operated* did not benefit and may have even harmed the lower income tenants Congress intended to help. But the discretion recognized in *Lynn* in no way justified HUD's refusal to implement the operating subsidy program,

which, as the district court in *Dubose* found, would accomplish exactly what Congress intended: to subsidize increasing costs of property taxes and utilities for tenants paying more than 25 to 30 percent of their incomes for rent. *Dubose u. Hills*, 405 F. Supp. 1277, 1285, fn. 41 (D. Conn. 1975).

It was one thing for HUD to cease commitments to subsidize construction of new housing projects that comprehensive studies showed would probably fail and then to adhere to that position in court. It was quite another to stubbornly defend its refusal to implement a new rent subsidy program Congress had determined to be necessary to save existing housing projects in which vast investments of private and public funds had been made. *Lynn* supports the proposition that HUD may discontinue a construction program proven to be counterproductive. It did not approve HUD's refusal to implement an untested new rent subsidy program. Such a refusal could only be based upon policy reasons. Policy decisions of that magnitude are for Congress to make.

HUD's refusal to implement the operating subsidy program was based on its philosophical differences with Congress. In evaluating the Secretary's exercise of her "narrow" discretion in these cases, the district court in the *Dubose* case specifically held:

> Congress adopted the 'operating subsidy provisions' in response to the serious problems of operating cost increases due to sharp rises in oil prices and local property taxes. The program was designed to assist only 'deserving' projects and their low-income residents. HUD cannot now refuse to fund or implement the 'operating subsidy' provisions because they only solve the particular problem for which they were designed, or because they only help the particular population for which they were enacted. The 'operating subsidy' program does not have a counterproductive impact on our national housing policy merely because it does not solve all the present problems facing HUD's multiassistance programs. Surely Congress has the power to solve the specific problem with which it is familiar without running the risk of administrative nonenforcement because it has not gone far enough, or not gone in the direction considered desirable by the administrative branch. *Dubose u. Hills, supra*, 405 F. Supp., at 1290–91 (footnote omitted).

In *Abrams u. Hills*, 547 F.2d 1062, 1068 (9th Cir. 1976), the Ninth Circuit readily rejected HUD's claims based on *Lynn*: ". . . *Lynn* is inapposite. To discuss this case is unnecessary because there is no conflict between the 'operating subsidy' program and any other housing program." There is no mention of the case in the decision from which HUD successfully petitioned this Court for *certiorari*. *Underwood u. Pierce*, 761 F.2d 1342 (9th Cir. 1985).

Pennsylvania u. Lynn provided no support for HUD's decision to quash operating subsidies. To the contrary, HUD should have been prompted by the decision to implement the operating subsidy program. As noted, *supra*, another program at issue in this case was the Section 101 rent supplement. 12 U.S.C. § 1701s. Its function was to subsidize rents of certain lower income residents of federally subsidized housing including the Section 236 program.

The rent supplement is analogous to the operating subsidy at issue in *Dubose*. As the court noted in *Lynn*:

> Unlike Sections 235 and 236, the Section 101 rent supplement program is not an independent housing construction program but . . . is piggybacked onto projects under other programs. *Lynn, supra*, 501 F.2d 850.

Also:

> The rent supplement program is not a housing construction program at all. Rather, it offers a subsidy to tenants in certain units in projects constructed under other programs, notably . . . the Section 236 program . . . . *Lynn, supra*, 501 F.2d 857.

In *Dubose u. Hills, supra*, 405 F. Supp. 1285, fn. 41, the district court recognized that the operating subsidy could help ". . . meet the need for lower income housing . . ." by keeping Section 236 projects out of default and by keeping rentals down for their low income tenants. The same could have been said for the rent supplement program.

While the *Lynn* court upheld HUD's total suspension of the Section 235 construction program, it refused to jettison rent supplements. Instead, the court only allowed suspension of Section 101 to a few potential future sponsors of the discontinued Section 236 program. Despite the suspension of Section 236, HUD had agreed not to dishonor the few inchoate commitments made prior to January 5, 1973. *See, e.g., Lynn, supra*, 501 F.2d 851, fn. 6. *Lynn* left the Section 101 rent supplement program virtually intact. Tenants in *existing* Section 221(d)(3) and Section 236 projects remained eligible for rent supplements. *Sicuro u. Hills*, 415 F. Supp. 553 (C.D. Cal. 1976).

Thus rent supplement, a program directly analogous to the operating subsidy, was *not* discontinued in the *Lynn* case upon which HUD relied in impounding operating subsidies. HUD's reliance on *Lynn* was misplaced and its position not substantially justified.

B. HUD Should Have Abandoned Its Prosecution Of This Litigation Prior To This Court's Issuance Of The Stay Of The District Court's Order.

On October 18, 1976, this Court issued a stay of the district court's order that HUD implement the operating subsidy program. *Hills u. Underwood*, 429 U.S. 892 (1976). HUD

relies on the issuance of this stay, a similar stay in *Dubose u. Harris*, Nos. 76-8311 and 76-6107 (2d Cir. Order of December 27, 1976), and writs of *certiorari* in two related suits, *Harris u. Ross*, 431 U.S. 928 (1977), and *Harris u. Abrams*, 431 U.S. 928 (1977), in support of its claim that its position in the operating subsidy cases was substantially justified.

On page (i) of the Brief for the Petitioner, HUD states the first of two issues in this case to be:

> 1. Whether the government was "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. III) 2412(d), in litigating a question on which this Court, at the government's request, *eventually* granted certiorari and issued a stay. (emphasis added).

Amicus emphasizes "eventually" because it was not until HUD had lost nine consecutive cases that the *Underwood* nationwide class action in which the initial stay was ultimately entered was filed in the district court. *See, Ross u. Community Services, Inc.*, 405 F. Supp. 831, 396 F. Supp. 278 (D. Md. 1975); *Dubose u. Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Abrams u. Hills*, 415 F. Supp. 550 (C.D. Cal. 1975); *Harrison u. Hills*, (W.D. Pa. C.A. No. 75-938, Oct. 1, 1975); *Carberry u. Hills*, (D. Mass. C.A. No. 76-521-F, March 9, 1976); *Parker Square Tenants Ass'n u. HUD*, (W.D. Mo. C.A. No. 75 CV 577-W-3, Jan. 27, 1976); *Gertsch u. Hills*, 414 F. Supp. 15 (D. Utah C.A. No. C75-513, March 5, 1976); *Folsom Gardens Action Comm. u. Hills*, (E.D. Cal. C.A. No. S-76-43-TJM, Feb. 12, 1976); and *Campbell u. HUD*, (N.D. Ohio C.A. No. C-75-471, Dec. 22, 1975). One of those cases, *Dubose u. Hills, supra*, was actually eight consolidated cases all filed by tenants in Connecticut. *Dubose u. Hills*, 22 F.R. Serv. 2d 476 (D. Conn. 1976). Thus, the figure of nine losses understates the extent of HUD's defeats in court. Also, of course, a tenth separate order was entered against HUD by the trial court prior to the stay in this case. *Underwood u. Hills*, 414 F. Supp. 526 (D. D.C. 1976); *Battles Farm u. Hills*, 414 F. Supp. 521 (D. D.C. 1976).

In *Dubose v. Pierce, supra*, 761 F.2d 918, the Second Court noted that in cases like this ". . . [t]he government's position must be evaluated according to the legal justification for its posture throughout the litigation . . . ." *Amicus* agrees that this Court should ". . . consider HUD's perspective as the agency developed its trial . . . strategy."

HUD's perspective prior to this Court's issuance of the initial stay should have been that it had lost ten consecutive decisions, most supported in no uncertain terms. The only legal precedent it claimed for its position, *Pennsylvania v. Lynn, supra*, had been held lacking for good reasons. Yet after the second, the sixth, the tenth decision against it, the agency continued onward, no doubt expending enormous governmental resources.

No matter what precise standard this Court chooses to apply, it could not have been substantially justified for HUD to continue to litigate this issue until the issuance of the stay by this Court on October 18, 1976. Given the decision in *Lynn, supra*, *amicus* contends this controversy should never have been litigated in the first place. In *Environmental Defense Fund v. Watt*, 722 F.2d 1081 (2d Cir. 1983), the court of appeals, affirming a trial court ruling ordering the government to pay EAJA counsel fees to a prevailing plaintiff, found ". . . it incumbent upon the government to abandon its opposition to the other party as soon as it becomes apparent that its litigation stance is not substantially justified." *See also, Porter v. Heckler*, 780 F.2d 920, 923 (11th Cir. 1986).

Congress agrees. When Congress reenacted EAJA after it sunsetted, it specifically approved cases holding that a prevailing party should be entitled to fees when the government continues to press a position already rejected in court:

> "To ignore precedent is not a 'substantially justified' position . . . . There are numerous instances of an agency's failure to follow precedent in the context of an EAJA case. *See National Resources v. USEPA*, 703 F.2d at 712; *Citizens Bank v. United States*, 558 F. Supp. 1301 (N.D. Ala. 1983); *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1984)." (Sen. Rep. No. 98-586, 98th Cong., 2d Sess. (1984), 12.)

Dubose was only the third in the unbroken string of nine operating subsidy cases HUD lost before *Underwood*. If Congress saw *Dubose* this way, surely the award of fees in this case was justified.

Amicus respectfully asks this Court to apply the sound reasoning of the court of appeals in *Environmental Defense Fund v. Watt* to this case. No private party could or would have continued to unsuccessfully litigate this obviously resolved issue in up to ten different courts without abandoning its meritless position. For this reason, as well as for others advanced by respondents, *amicus* respectfully contends that this Court's stay cannot be the basis for a reversal in this case.

CONCLUSION

The foregoing are but two of the many reasons why the Ninth Circuit's award of attorneys' fees to the respondents in this case should be upheld. "An award of attorneys' fees pursuant to the EAJA provides the incentive necessary to enable persons . . . to pursue benefits they legally deserve." *Barry v. Heckler*, 638 F. Supp. 444, 446 (N.D. Cal. 1986). If ever there were an appropriate case to further that Congressional purpose, it is indeed this one. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

AMICUS CURIAE

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BRIEF

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No. 86-1512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Petitioner,

v.

MYRNA UNDERWOOD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE SMALL BUSINESS FOUNDATION OF AMERICA, INC., NATIONAL SMALL BUSINESS UNITED, SMALL BUSINESS LEGISLATIVE COUNCIL, SEN. CHARLES E. GRASSLEY, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the government was "substantially justified" within the meaning of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in litigating a question on which this Court, at the government's request, eventually granted certiorari and issued a stay pending appeal.

2. Whether the courts below properly identified the "special factors" that justify a departure from EAJA's usual $75-per-hour cap on attorneys' fees.

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INTEREST OF THE *AMICI CURIAE*

The *amici* include four organizations representing over 100 small business associations, and a United States Senator.[1] Amici and their small business members have

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[1] The Small Business Foundation of America, Inc. is a New England-based non-profit entity whose purpose is to support re-

a strong interest in effective implementation of the Equal Access to Justice Act ("EAJA"), which authorizes attorney fee awards to small businesses that prevail over the federal government when the government's position is not "substantially justified."

EAJA recognizes that small businesses and individuals of modest means often cannot resist unjustified government action because the costs of litigation are so high. EAJA ensures that when the government's actions are not "substantially justified," the government must pay the fees of small private parties. This policy promotes fair treatment of parties with modest resources and should improve government by allowing citizens effectively to oppose unjustified government actions.

Amici, who have long supported the principles behind EAJA, have been troubled by the Executive branch's often-tenacious resistance to the Act. This case presents an important opportunity to enforce the congressional purpose behind EAJA. In particular, the application of the "substantial justification" standard is of central importance. Congress has made clear on several occasions that to avoid a fee award under EAJA the government must show that its position was more than reasonable. The government, however, continues to argue for a weak construction of the standard.

Because *amici* believe that this Court's decision will have a direct effect on them and their members, *amici*

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search and other activities on behalf of small business. National Small Business United is an association of fourteen regional small business associations, which are listed in Appendix A to this Brief, and more than 40,000 individual company members. The Small Business Legislative Council consists of 90 different trade associations, who are listed in Appendix B to this brief. The National Federation of Independent Business is a small business association whose membership includes more than 500,000 independently owned and operated businesses. Sen. Charles E. Grassley of Iowa was the principal Senate sponsor of the Equal Access to Justice Act legislation approved by Congress in 1984 and 1985.

submit this brief to assist the Court in its resolution of the case.[2]

STATEMENT OF THE CASE

1. Respondents brought a nationwide class action in March 1976 seeking release of a $60 million fund established by Congress to assist tenants in government-subsidized apartment houses. By the time this action was filed, the government had lost nine consecutive lawsuits raising the same claim.[3] The District Court agreed with those prior decisions and granted summary judgment to the plaintiffs. 414 F. Supp. 526 (D.D.C. 1976). The U.S. Court of Appeals for the District of Columbia Circuit refused to grant a stay pending appeal. This Court granted a stay, 429 U.S. 892 (1976), and in 1977 granted certiorari to hear two other cases raising identical claims.[4] Those two cases and this one ultimately were settled on terms favorable to the plaintiffs.

2. The settlement required administration for several years of the $60 million fund. The prevailing plaintiffs

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[2] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[3] *Ross v. Community Services, Inc.*, 396 F. Supp. 278, *subsequent opinion*, 405 F. Supp. 831 (D. Md. 1975), *aff'd mem.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom. Harris v. Ross*, 431 U.S. 928 (1977), *remanded to district court for consideration of settlement*, 439 U.S. 1001 (1978); *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Abrams v. Hills*, 415 F. Supp. 550 (C.D. Cal. 1975), *aff'd*, 547 F.2d 1062 (9th Cir. 1976), *cert. granted sub nom. Harris v. Abrams*, 431 U.S. 928 (1977), *remanded to district court for consideration of settlement*, 439 U.S. 1001 (1978); *Harrison v. Hills*, C.A. No. 75-938 (W.D. Pa. Oct. 1, 1975); *Carberry v. Hills*, C.A. No. 76-521-F (D. Mass., Mar. 8, 1976); *Parker Square Tenants Ass'n v. HUD*, C.A. No. 75 CV577-W-3 (W.D. Mo., Jan. 27, 1976); *Gertsch v. Hills*, 414 F. Supp. 15 (D. Utah 1976); *Folsom Gardens Action Comm. v. Hills*, No. S-76-43-TJM (E.D. Cal., Feb. 12, 1976); *Campbell v. HUD*, C.A. No. C75-471 (N.D. Ohio, Dec. 22, 1975).

[4] *Ross v. Community Services, Inc.*, *supra*; *Harris v. Abrams*, *supra*.

moved for fees in 1982. The District Court held that the government's position was not "substantially justified" under EAJA, 28 U.S.C. § 2412(d)(1)(A), and awarded $1.1 million in fees. The court of appeals agreed that plaintiffs were entitled to recover fees, but reduced the award to $322,700.

SUMMARY OF THE ARGUMENT

1. Because this Court is considering EAJA for the first time, we emphasize the basic concerns that prompted Congress to enact the statute. First, Congress recognized that government has grown so powerful that it often can be opposed by only the most determined citizens, and the price of that opposition may well exceed the resources of an individual or small business. Basic notions of fairness are offended when parties must concede their rights because they cannot afford to assert them. EAJA is a profoundly democratic law, helping small businesses and individuals to oppose unjustified actions by their own government.

Second, Congress worried that if individuals and small businesses cannot afford to oppose unjustified government actions, those mistakes could go uncorrected and the traditional checks on Executive power would be eroded. Congress adopted the fee-shifting provisions in EAJA to increase the fairness and the effectiveness of government.

The heart of EAJA is the requirement that fees be awarded to prevailing eligible parties unless the government affirmatively shows that its position was "substantially justified." When first considering EAJA in 1979 and 1980, Congres rejected the Executive's arguments that fees should be allowed against the government only when its position had been "arbitrary, frivolous, unreasonable and groundless," or was not "reasonably justified." Instead, Congress adopted the substantial justification standard, emphasizing that the government always carries the burden of meeting that standard. Congress

saw this test as a middle ground between the narrow standards proposed by the Executive and an automatic fee award provision, which might deter enforcement of the laws.

In 1984, Congress voted to extend EAJA beyond its initial three-year term and to expand the Act significantly. The legislation would have raised the eligibility criteria to include businesses with a net worth of less than $7 million and fewer than 500 employees, and individuals with a net worth of less than $2 million. The legislation also would have clarified that fees should be awarded when the agency's underlying action was not substantially justified, no matter how correct the agency's litigation position was. President Reagan, however, vetoed the bill.

When Congress reenacted essentially identical legislation in 1985, it reaffirmed that the substantial justification standard means more than reasonableness. The Executive now seeks to win from this Court what Congress repeatedly has denied it: a narrow standard for awarding fees under EAJA. Such an outcome would be contrary to the statutory language, the legislative history and the purposes of the Act.

EAJA has not triggered an unmanageable flood of fee litigation, nor has it prompted a raid on the public treasury. The total fees awarded in five years under EAJA are less than $8 million, or about 10 percent of the fees that were expected would be paid in the first year under the Act. The average fee award in 1,200 court cases has been $6,118. The courts have applied the law judiciously and fairly, awarding fees when the circumstances justify it. Five circuits have rejected the government's narrow version of the substantial justification standard, and this Court should do so as well, giving effect to the high purposes of the Act.

2. EAJA caps fee awards at $75 per hour unless "special factors" justify a higher hourly rate. The court

below properly reviewed the factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), in determining whether special factors were present in this case. *Kerr* provides a useful taxonomy of those additional considerations which might justify fee awards in excess of the $75 per hour ceiling. Awards above the ceiling (after adjustment for cost of living increases) properly have been very unusual under EAJA. Nevertheless, Congress expressly authorized such awards and the court of appeals was justified in exceeding the ceiling in this case.

ARGUMENT

I. UNDER THE SUBSTANTIAL JUSTIFICATION STANDARD, THE GOVERNMENT FAILED TO MAKE A STRONG SHOWING THAT ITS POSITION WAS SOLID AND CLEARLY REASONABLE ON THE LAW AND FACTS

The government seeks in this case to establish a gentle, forgiving construction of the substantial justification standard: to avoid an EAJA award, the government suggests that it must establish only that its arguments had "some substance" or a "fair possibility of success." Pet. Br., pp. 16, 19. The government's proposed standard is not consistent with the terms of the statute, its six-year legislative history, or the congressional purposes in enacting EAJA, all of which require a more demanding standard. Indeed, the government's brief presents a very selective and incomplete view of the statute.

A. Through EAJA, Congress Sought To Attack Government Abuses Against Small Businesses And Individuals Of Modest Means

EAJA was enacted by a Congress concerned that government increasingly is indifferent to the legitimate concerns of small private parties. Congress was distressed by evidence that citizens and small businesses simply cannot afford to oppose unjustified government actions.

The 1979 Senate Report on EAJA expressed the fear that our law could be corrupted by the disparity in resources between the government and the governed (S. Rep. No. 253, 96th Cong., 1st Sess. 5 (1979)):

> While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process.

Both the Senate Report and the House floor manager quoted testimony by a Federal Trade Commission official that because government lawyers "measure their own success in terms of the number of complaints brought and cases won," the "typical [government] attorney shies away from a complex, long, uncertain legal contest with well-represented giant corporations and tries to build up a portfolio emphasizing small, easy-to-win cases. The net results of these broad propensities is that it is the little guys, not the giants that dominate our manufacturing and trade industries, who typically get sued." *Id.*, at 5 n.1; 126 Cong. Rec. H10226 (daily ed. Oct. 1, 1980) (Rep. Smith) (quoting F.M. Scherer, Director of FTC Bureau of Economics).

Through EAJA, Congress hoped to make it easier for small businesses and individuals to oppose unjustified government actions. Pub. L. 96-481, § 202 (c)(1). The House Report in 1980 warned that the disparity of resources between government and small businesses may

create "a federal enforcement system unfettered by the usual checks and balances that are common to our system of government" and may "lead to a further erosion of the belief that this is a Government of laws and not of men." H. Rep. No. 1005, Part 1, 96th Cong., 2d Sess. 7-8 (1980).

Although Congress recognized that an automatic fee-shifting statute might chill government enforcement efforts, it frankly aimed to deter some government activity. As one sponsor stated (126 Cong. Rec. S10922 (daily ed., July 31, 1979) (Sen. Nelson)):

> In those situations where the Government agency goes ahead without a strong case against a business; or where it proceeds carelessly; or where it now imposes a fine, secure in the knowledge that its action will not be challenged because of the cost involved, I would be vey happy if the enactment of this legislation caused some chilling effect on Government regulatory efforts. It is vital that we hold the Government to a strict standard of care in its enforcement efforts, deterring those abuses which can be prevented, and providing a mechanism for compensating individuals and businesses for those governmental mistakes which cannot.

The same themes were sounded when Congress voted to reenact EAJA in 1984 and successfully revived the law in 1985. S. Rep. No. 586, 98th Cong., 2d Sess. 4-5 (1984); H. Rep. No. 120, 99th Cong., 1st Sess. 4-5 (1985); *see* 131 Cong. Rec. S9992 (daily ed., July 24, 1985) (Sen. Grassley) (with EAJA, "the legal playing field has been leveled").

B. In Choosing the Substantial Jurisdiction Standard, Congress Rejected Proposals For A More Relaxed Standard

Congress recognized that the standard for awarding fees under EAJA was the key to the success of the statute. The substantial justification standard was chosen

to "balance[] the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." S. Rep. No. 253, *supra*, at 6. But Congress expressly rejected proposals for the gentle standard that the government now urges.

The 1979 Senate Report stated that the Judiciary Committee defeated a motion to change the standard to "reasonably justified." *Id.*, at 8. It also stated that the committee rejected a proposal from the Department of Justice that fees be awarded only when the government action was "arbitrary, frivolous, unreasonable or groundless." *Id.*, at 15. The principal Senate sponsor of the bill, Sen. DeConcini, explained that decision during floor debate, stating that "the Department's standard was simply too narrow." 126 Cong. Rec. S10914 (daily ed., July 31, 1979). The House Report concurred, observing that the Justice Department's proposal would make fees "difficult to obtain" and thus would not reduce the deterrents against opposing government action. H. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980).

When EAJA was debated in the fall of 1980, one House sponsor noted that the Carter Administration opposed the legislation and instead "supports a Department of Justice proposal (H.R. 7208) which places the burden on the prevailing party to show that the position of the United States was unreasonable in order to obtain fees, and would make the award purely discretionary with the court or agency." 126 Cong. Rec. H10223 (daily ed., Oct. 1, 1980) (Rep. Kastenmeier). The bill was opposed by other groups, including "the consumer, the civil rights and the environmental organizations," who also objected to the "too broad standard in the award of attorneys' fees." *Id.* at H10221 (Rep. Drinan).

Because of confusing statements in the legislative history suggesting that substantially justified means rea-

sonable, *see* Pet. Br. pp. 14-16, many courts initially equated substantial justification with reasonableness. Congress promptly noted that error by the courts and considered how to correct it.

In 1983 testimony, Sen. DeConcini recalled that Congress had rejected a reasonableness standard for EAJA (Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 98th Cong., 1st Sess., at 17 (1983)):

> We rejected reasonableness based on a number of court decisions . . . and we wanted to find something that would tell the court that we wanted a little bit more than just a reasonable justification by the Government. We came up with the word "substantial."

Sen. DeConcini observed that many court decisions nevertheless had adopted a reasonableness test for EAJA. He proposed that the substantial justification standard be retained, but suggested that the subcommittee announce "some language or comment indicating the subcommittee intends a slightly higher burden on the Government than mere reasonableness." *Id.*

Rep. Kastenmeier, the principal House sponsor in 1984, expressed disappointment that "the act has not been more extensively applied by agencies and courts." Equal Access to Justice Act Amendment: Hearing before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, 98th Cong., 2d Sess., at 1 (March 14, 1984). He added that " 'substantially justified' was not the same as 'reasonable,' a term that was rejected outright [by Congress]. Rather, the term required more than that the Government show it had merely acted reasonably." *Id.*, at 2.

In approving a permanent extension of the law in 1984, Congress followed the course proposed by Sen. DeConcini. Congress plainly concluded that the phrase "substantially justified" carried the correct meaning for EAJA fee awards, but that earlier legislative history had confused the courts in applying the standard. Congress clarified that legislative history.[5]

The Senate Report for the 1984 legislation stressed that the Senate Judiciary Committee in 1979 had rejected "reasonably justified" and concluded that this refusal "indicates that the test should, in fact, be slightly more stringent than one of reasonableness. A number of cases have so held." S. Rep. No. 586, *supra*, at 10. The Report cautioned that courts and agencies "should be mindful to be faithful to one of the EAJA's purposes: that only sound, well-prepared cases be initiated [citation omitted] and that the government must [m]ake a 'strong showing' that its position was substantially justified." *Id.* at 11.

The 1984 House Report was equally clear (H. Rep. No. 992, 98th Cong., 2d Sess. 7 (1984)):

> Another problem which has developed in the implementation of the Act has been the fact that courts have been divided on the meaning of 'substantial justification.' Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980 Congress rejected a standard of 'reasonably justified' in favor of 'substantially justified,' the test must be more than mere reasonableness.

The 1984 legislation included a second major clarification, establishing that the "position of the United States" that must be substantially justified includes the underlying agency action that gave rise to the lawsuit. Pub. L. No. 99-80, § 2 (Aug. 5, 1985). This amendment

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[5] Because the successful reenactment of the EAJA in 1985 was so similar to the 1984 legislation, the legislative deliberations in 1984 are directly relevant to the construction of EAJA. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

rejected numerous court holdings that no fees need be awarded when the government's "litigation position" was substantially justified, even if the underlying agency action was outrageously illegal. *See* H. Rep. No. 992, *supra*, 8-9.

Although President Reagan vetoed the 1984 legislation, Congress approved substantially identical legislation the following year, making it retroactive to its 1984 expiration date, and the president signed the 1985 bill. The House Report accompanying that legislation repeated verbatim the statement from the previous year's House Report that substantial justification means more than merely reasonable. H. Rep. No. 120, 99th Cong., 1st Sess. 9 (1985).

The government urges this Court to ignore the 1985 House Report, arguing that several congressmen criticized "portions of that report" during floor debate. Pet. Br., pp. 17-18. This contention is very misleading. No congressman made any negative reference to the House Report's statement that substantial justification means more than reasonableness. *See Riddle v. Secretary of Health & Human Services*, 817 F.2d 1238, 1242 (6th Cir. 1987), *opinion vacated for consideration en banc*, 823 F.2d 164 (6th Cir. 1987) ("no official in Congress expressed displeasure with the House Report's rejection of the reasonableness standard"). Indeed, the rejection of the reasonableness standard in the 1985 House Report was simply a restatement of congressional intent as it had been expressed repeatedly between 1979 and 1985.[6]

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[6] The government's misleading remark refers to an exchange during floor debate which referred exclusively to the following passage in the House Report: (H. Rep. No. 120, pp. 9-10)

> Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such an action to be found to be substantially justified under the Act.

This statement was based on the clarification that "position of the United States" includes the underlying agency action that prompted the litigation, as well as the agency's litigation position. Both logic and the ordinary meanings of the English language suggest that agency action that was "arbitrary and capricious" or "unsupported by substantial evidence" probably also was not substantially justified. Indeed, that was the conclusion of the 1985 floor debate, as well.

A minority member of the House Judiciary Committee described these two sentences in the House Report as "the only error I found in the report," adding that there are no automatic fee awards under EAJA simply because the government lost the case. 131 Cong. Rec. 16917 (1985) (Rep. Kindness). Significantly, however, the same congressman then stated, "The committee recognizes the close relationship between the two concepts [substantial justification and substantial evidence] *and the fact that a finding [that] the Government was not supported by substantial evidence should be accorded careful scrutiny.*" *Id.* (emphasis added). The House floor manager agreed that there is a "close relationship between the two concepts and the fact that the Government action was not supported by substantial evidence should be accorded substantial weight." *Id.*, at 16918 (Rep. Kastenmeier).

In Senate debate, the principal Senate sponsor also was asked about the House Report language quoted above. Sen. Grassley replied that he would "not say it the same way," and that EAJA does not prescribe "automatic fee shifting." 131 Cong. Rec. S9993 (daily ed., July 24, 1985). He added (*id.*) (emphasis added):

> However, I would say that where the agency action is found by a court to be arbitrary and capricious or where there is little or no factual support for the agency, the Government—as a practical matter—has its work cut out for it to prove substantial justification. *Indeed, in the case of an arbitrary and capricious finding, the plain meaning of the words strongly suggest that the Government was not substantially justified.* I believe that this view is consistent with the committee report on S. 919 [S. Rep. No. 586, *supra*], a bill we passed unanimously in the closing days of the 98th Congress.

Consequently, the Senate and House debate was, at bottom, not very critical of the House Report. More important for this case, of course, no speaker questioned that substantially justified means more than reasonable.

C. Experience With EAJA And The Substantial Justification Standard Reinforces the View That Substantially Justified Means More Than Reasonable

When EAJA was enacted, the Congressional Budget Office predicted for the first year that $69 million in fees would be awarded in 3,000 court cases and 2,700 administrative proceedings, and that annual fee awards under the Act would rise to $126 million in the third year. H. Rep. No. 1418, *supra*, at 21-23.[7] The predictions were wildly inaccurate.

Over the first five years under the statute, the courts awarded about $7.3 million in fees in 1,200 cases. The average award has been $6,118. In administrative proceedings, fee awards have been rare, with only 32 awards totalling $357,973 over the first four years.[8]

When only court cases are examined, it is clear that the courts have implemented the expansion of EAJA that was announced in the 1984 and 1985 congressional actions. The percentage of successful fee applications

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[7] The 1980 congressional projections noted that the government loses approximately 12,000 civil cases every year in federal court. H. Rep. No. 1418, *supra*, at 22.

[8] These statistics are derived from the Report by the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses under the Equal Access to Justice Act of 1980, July 1, 1985 through June 30, 1986 (Sept. 18, 1986), p. 2, and the Report of the Chairman of the Administrative Conference of the United States On Agency Activities Under the Equal Access to Justice Act, October 1, 1984-September 30, 1985 (June 6, 1986), App. IV.

The greatest number of fee awards has gone to individuals. For the 12-month period ending June 30, 1986, 88 per cent of the EAJA fee applications in court cases were lodged against the Department of Health and Human Services, and "nearly all of these cases involve the termination of disability benefits under the Social Security Act." Report by the Director of the Administrative Office of the United States Courts, *supra*, at 1.

increased sharply between the two periods 1982-84 and 1985-86:

	Total Petitions	Petitions Granted	Percentage Granted
1982-84	470	225	48%
1985-86	1254	975	78%

This increase may be attributed in large part to two actions by Congress in 1984 and 1985—the broader definition of "position of the United States" and the clarification that substantially justified means more than merely reasonable.

Five Circuits and the Administrative Conference of the United States (ACUS) have held that substantially justified means more than merely reasonable. The D.C. Circuit always has taken this view, *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), while panels of the Third, Sixth, and Eighth Circuits and the en banc Federal Circuit have reached that conclusion since the 1985 reenactment. In *Riddle v. Secretary of Health & Human Services*, *supra*, Judge Jones cogently explained the distinction between substantially justified and reasonable (817 F.2d at 1243):

> *In toto*, the report and the statements on the floor indicate that in 1985 Congress was merely attempting to achieve the 'middle gound' it had hoped to delineate in 1980. It did not want fees to be awarded each time a party prevailed against the government, nor did it want fees to be awarded only when the government's position was frivolous [citation omitted]. The problem with a reasonableness test is that it may lead to awards being given only when the government's position is frivolous, for 'reasonable' simply means 'not absurd,' 'not ridiculous,' and 'not conflicting with reason.' 2 Webster's Third New International Dictionary Unabridged 1892 (1965).

Riddle held that "in order to be substantially justified, the government's position must have *more* than a

'reasonable basis in law and fact," but "must be firmly grounded or solidly based in law and fact." 817 F.2d at 1244 (emphasis in original). This test resembles the Federal Circuit's conclusion that the government must "show that it was *clearly* reasonable in asserting its position. . . . It is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.'" *Gavette v. Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986) (en banc) (emphasis in original). *See Grace v. Burger*, 763 F.2d 457, 458 (D.C. Cir. 1985) (government "must demonstrate that its litigation position had a solid basis in fact and law"); *Lee v. Johnson*, 799 F.2d 31, 38 n.7 (3d Cir. 1986) (government "must show more than that position was merely reasonable; it must also demonstrate that the position presented an unsettled or close question of law"); *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986) (the government "must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct").

Of particular significance, ACUS also has concluded that substantially justified means more than merely reasonable. 51 Fed. Reg. 16659, 16661 (1986). Accordingly, ACUS has deleted the reasonableness standard from the model EAJA regulations it publishes for the guidance of all Executive agencies. *Id.* Because ACUS has been charged by Congress with a special responsibility for implementation and oversight of EAJA, 5 U.S.C. §§ 504(c)(1) & (e), its views should be accorded particular weight. *E.g., Board of Governors of Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 56-57 & n.21 (1981).

EAJA deters agencies from taking unjustified actions, *see* 131 Cong. Rec. S9992 (daily ed., July 24, 1985) (Sen. Grassley), and has allowed small businesses to re-

cover fees in many outrageous situations. *E.g., In re Estate of Lee*, 812 F.2d 253 (5th Cir. 1987) (bankruptcy filed when government failed to honor valid federal flood insurance claims); *Lee v. Johnson, supra* (with no warrant, customs agents padlocked importer's office, garage and warehouse, seizing and refusing to return warehouse contents); *Trust Co. of Columbus v. United States*, 776 F.2d 270, 272 (11th Cir. 1985) (when bank explained that tax levy was illegal, government "did not reply"); *Keasler v. United States*, 766 F.2d 1227 (8th Cir. 1985), (firm forced to pay excise tax and sue for refund despite judicial authority exempting it from tax); *Engen v. Rooney*, 21 EAJA-SE-6288 (NTSB, Jan. 29, 1985) (restoring commercial pilot certificate because if pilot had taken any other action "the three aircraft occupants might be dead now").

The distinction between reasonableness and substantial justification may seem technical or insignificant. Undoubtedly there are cases in which fees would be awarded under either standard. But Congress's dogged insistence that substantial justification is a more demanding standard, and the increase in fee awards since the 1984 and 1985 congressional actions clarifying the standard, suggest that the distinction is not merely an exercise in scholasticism, but is a critical element of the statute.

D. The Government Cannot Carry Its Burden Under EAJA Merely By Referring To "Objective Indicia"

Under EAJA, the government bears the burden of proving substantial justification. The statute provides that a court "shall award" fees to the prevailing private party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The 1980 House Report observed that "it is particularly appropriate to place the burden on

the government" to defeat a fee application under EAJA, H. Rep. No. 1418, *supra*, p. 18, and the 1984 Senate Report observed that the government "must [m]ake a 'strong showing' that its position was substantially justified." S. Rep. No. 586, *supra*, p. 11 (citing H. Rep. No. 1418, *supra*, p. 11).

The government attempts to evade that burden by arguing that "objective indicia of reasonableness" (such as lower court rulings, dissenting opinions or grants of stays) can—standing by themselves—satisfy its burden. Such an approach would reverse the statute's basic thrust, allowing the government easily to discharge its burden to make a "strong showing" of substantial justification.

There are no simple, presumptive answers to the substantial justification inquiry. The 1979 Senate Report noted that courts "should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed," because such cases "clearly raise the possibility that the Government was unreasonable in pursuing the litigation." S. Rep. No. 253, *supra*, p. 7. But the Report cautioned that there is no "presumption that the Government position was not substantially justified, simply because it lost the case." *Id.* By the same reasoning, the objective indicia mentioned in the government's brief surely would be relevant to an EAJA fee application, but could raise no presumption that the government's position was substantially justified.

Moreover, the government's argument is premised on a gentle application of the substantial justification test. A court may grant a stay out of concern for irreparable injury if a major federal program is enjoined, yet the court may discover upon full review of the case that the government's position is not substantially justified.

Grant of the stay cannot, without more, establish substantial justification for the government's underlying position.

Congress did not share the government's expressed concern that the objective indicia approach is necessary to avoid fee litigation. Pet. Br., p. 20. Sen. DeConcini, who sponsored the original legislation, noted with some satisfaction in 1985 that under EAJA "legitimate agency enforcement efforts were not hampered nor were courts and agencies clogged with frivolous claims for relief." 131 Cong. Rec. S9993 (daily ed., July 24, 1985). A similar observation was made by the Chief Counsel for Advocacy of the Small Business Administration. *Id.*, at S9995.

Moreover, if the government truly wishes to reduce "wasteful" and "duplicative" EAJA fee litigation, it need only reform its own litigation tactics. The 1984 Annual Report by the Director of the Administrative Office of the United States Courts noted that "the U.S. appeals most of the awards" under EAJA (p. 72), while the 1986 Report, *supra*, p. 2, observed again that "many awards are appealed."

E. The Fee Award In This Case Was Proper.

Applying the correct standard here, the District Court plainly had an adequate basis for finding that the government's position was not substantially justified. The plaintiffs won summary judgment on a claim that had been accepted by nine other courts and rejected by none. The court of appeals refused to grant a stay pending appeal, and the case ultimately was settled on terms totally favorable to plaintiffs.

The government relies entirely upon this Court's actions in granting a stay in this case and in granting certiorari in *Abrams*, *supra*, and *Ross*, *supra*, which presented the same issue. As the District Court noted, how-

ever, those actions were unexplained, 547 F.Supp. at 262, and they did not represent a considered review and judgment of the merits of the case. In these circumstances—and in light of the strength of respondents' substantive claim under the Housing Act, as explained in respondents' brief—fees properly were awarded under EAJA.

II. THE NINTH CIRCUIT PROPERLY CONSTRUED THE "SPECIAL FACTORS" THAT MAY INCREASE A FEE AWARD UNDER EAJA

EAJA authorizes fee awards in excess of the $75-per-hour cap in two circumstances: (i) an increase in the cost of living, or (ii) a "special factor, such as the limited availability of qualified attorneys for the proceedings involved." 28 U.S.C. § 2412(d)(2)(A). A number of courts have granted EAJA awards above the $75 cap because of inflation, *e.g.*, *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 713 (3d Cir. 1983), and that practice is not challenged in this case.

The government's complaint here is that the Ninth Circuit should not have found any "special factor" that justified a fee award in excess of the $75 hourly cap. The government complains that the court below not only found that there were few qualified attorneys available to handle this lengthy *pro bono* case—which is enumerated in the statute as a special factor—but also found additional special factors, including "the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained." The government warns that the ruling below will totally undermine the $75 cap. Pet. Br., at 35, 37-38.

As a threshold matter, the government's professed fears seem exaggerated. Of the 1,200 fee awards in the first five years under EAJA, only a handful have granted fees above the $75 cap on the basis of special

factors. There is no indication that the courts have disregarded the congressional directive that the $75 hourly rate, adjusted for inflation, should apply to most EAJA cases.

Moreover, the legislative history establishes that special factors "are not limited to" the situations enumerated in the statute: inflation and limited availability of counsel. H. Rep. No. 1418, *supra*, p. 15; S. Rep. No. 253, *supra*, p. 16. For guidance as to what properly might be considered a special factor, the Ninth Circuit reasonably looked to its rulings under other attorneys' fee statutes, as expressed in *Kerr v. Screen Extras Guild*, *supra*. Other courts have followed similar reasoning. *E.g.*, *Florida Suncoast Villas, Inc. v. United States*, 776 F.2d 974 (11th Cir. 1985). This approach is consistent with numerous references in EAJA's legislative history to experience under other fee statutes. *E.g.*, H. Rep. No. 1418, p. 11 ("prevailing party" under EAJA defined by reference to civil rights fee award cases); S. Rep. 586, *supra*, at 14 (same for costs awarded under EAJA); *id.* at 17 (same for award of interest under EAJA). *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756-57 (1979) (because new statute is patterned after earlier statute, Congress must have intended similar application of both statutes).

But the government attacks the plain congressional intent when it argues that there could be no showing of limited availability of qualified attorneys in this case because respondents' counsel "could have had *no* expectation of a fee award" and "expressly disavowed any intent to obtain a fee from the settlement fund." Pet. Br., pp. 33-34. This argument ignores the statement in the legislative history that fees are to be awarded "without reference to the fee arrangements between the attorny and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might nor-

mally receive for services rendered is not relevant to the computation of fees under the act. In short, the award of fees is to be determined according to general professional standards." S. Rep. No. 253, *supra*, at 16-17; H. Rep. No. 1418, *supra*, p. 15. Congress did not want the size of EAJA fee awards to turn on whether counsel was on retainer, was working for hourly fees, or was donating his time for idealistic reasons. *Cf. Blum v. Stenson*, 465 U.S. 886, 894-95 (1984) (in civil rights case, fee awards made "regardless of whether plaintiff is represented by private or nonprofit counsel").

The government's error on this point may be illustrated by considering the situation of a client like Myrna Underwood. She had a strong claim against the federal government that could have required years of litigation, but she could not afford to pay any fees. The government was prepared to resist the claim fiercely, as it had in the nine earlier lawsuits it had lost on the same claim, so the litigation promised to be complex and protracted. In such circumstances, there is ample basis for finding a limited availability of qualified attorneys to handle the matter. Neither the private bar nor most non-profit law firms could take on such a case. *See* Declarations of Charles F. Palmer, Cheryl White Mason and Carlyle W. Hall, Jr., Supplementary Excerpts of Record as Filed by Plaintiffs-Appellees in court of appeals, at 61, 68, 71.

Finally, the government totally ignores the benefits to the courts and the opposing party when counsel has special expertise or performs at an extremely high level of competence. *See Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943, 947 (N.D. Cal. 1983) (expertise in Indian fishing rights and contracting with Indians); *Local 3-98, International Woodcutters of America v. Donovan*, 580 F. Supp. 714, 717 (N.D. Cal. 1984), *aff'd*, 769 F.2d 1391 (9th Cir. 1985) (counsel's expertise saved the government "over Two Million Dollars in administrative costs"). There is no basis in this record for disputing

the conclusions of the courts below that fee awards exceeding the $75 cap were appropriate here, or for questioning the total award for many years of extremely effective representation.

CONCLUSION

For all of the foregoing reasons, amici urge that the ruling below be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

The membership of National Small Business United includes:

Smaller Business Association of New England
Council of Smaller Enterprises (Cleveland, OH)
Georgia Small Business Association
Independent Business Association of Illinois
Independent Business Association of Wisconsin
Ohio Small Business Council
Small Business Association of Michigan
Small Business Council/Denver Chamber of Commerce
Small Business Council/San Antonio, TX
Smaller Manufacturers Council
Louisiana Independent Small Business Association
Louisville, KY, Chamber of Commerce
Mid-Continent Small Business United
Association of Small Business Development Centers

APPENDIX B

The membership of Small Business Legislative Council includes:

Alliance of Independent Store Owners and Professionals
American Association of Nurserymen
American Consulting Engineers Council
American Council of Independent Laboratories
American Dental Trade Association
American Electronics Association
American Machine Tool Distributors Association
American Society of Travel Agents, Inc.
American Sod Producers Association
American Subcontractors Association
American Textile Machinery Association
American Trucking Associations, Inc.
American Warehousemen's Association
Architectural Precast Association
Associated Landscape Contractors of America
Association of Physical Fitness Centers
Association of Small Business Development Centers
Association of the Wall and Ceiling Industries-International
Automotive Service Association
Automotive Warehouse Distributors Association
Building Service Contractors Association International
Business Advertising Council
Christian Booksellers Association
Direct Selling Association
Electronic Representatives Association
Florists' Transworld Delivery Association
Helicopter Association International
Independent Bakers Association
Independent Bankers Association of America
Independent Insurance Agents of America, Inc.
Independent Medical Distributors Association

Independent Sewing Machine Dealers Association
International Association of Refrigerated Warehouses
International Bottled Water Association
International Communications Industries Association
International Fence Industry Association
International Franchise Association
International Reciprocal Trade Association
Jewelers of America
Latin American Manufacturers Association
Machinery Dealers National Association
Manufacturers Agents National Association
Mechanical Contractors Association of America, Inc.
Menswear Retailers of America
National Association for the Self-Employed
National Association of Aircraft and Communication Suppliers
National Association of Brick Distributors
National Association of Catalog Showroom Merchandisers
National Association of Chemical Distributors
National Association of Development Companies
National Association of Home Builders
National Association of Investment Companies
National Association of Manufacturing Opticians
National Association of Personnel Consultants
National Association of Plumbing-Heating-Cooling Contractors
National Association of Realtors
National Association of Retail Druggists
National Association of Small Business Investment Companies
National Association of the Remodeling Industry
National Association of Truck Stop Operators
National Association of Women Business Owners
National Candy Wholesalers Association
National Chimney Sweep Guild
National Coffee Service Association

National Council for Industrial Innovation
National Electrical Contractors Association
National Fastener Distributors Association
National Grocers Association
National Independent Dairy-Foods Association
National Moving and Storage Association
National Office Products Association
National Parking Association
National Precast Concrete Association
National Shoe Retailers Association
National Society of Public Accountants
National Tire Dealers & Retreaders Association
National Tooling and Machining Association
National Tour Association
National Venture Capital Association
Opticians Association of America
Petroleum Marketers Association
Printing Industries of America, Inc.
Retail Floorcovering Institute
Small Business Council of America, Inc.
Smaller Manufacturers Council
Society of American Florists
Specialty Advertising Association International
United Bus Owners of America
Web Sling Association

AMICUS CURIAE

BRIEF

No. 86-1512

(5)

Supreme Court, U.S.
FILED
OCT 6 1987
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

v.

MYRNA UNDERWOOD, ET AL.,

Respondents.

BRIEF OF BATTLES FARM COMPANY ET AL. AS AMICI CURIAE

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Respondents.

BRIEF OF BATTLES FARM COMPANY ET AL. AS AMICI CURIAE

Battles Farm Company, Bay Village Company, Cummins Tower Company, and Southfield Gardens Company (collectively, "the Battles Farm projects") respectfully submit this brief as amici curiae. The amici support the respondents Underwood et al. and urge the Court to affirm the decision of the United States Court of Appeals

for the Ninth Circuit holding that the district court did not abuse its discretion in awarding the respondents fees under the Equal Access to Justice Act ("EAJA").[1]

INTERESTS OF THE AMICI CURIAE

The Battles Farm projects are the owners of four lower-income housing projects built pursuant to section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. They were among the projects jeopardized by the refusal of the Secretary of Housing and Urban Development ("HUD") to implement the so-called "operating subsidy program" enacted by Congress in 1974. Shortly before the respondents commenced the Underwood action, the Battles Farm

1. Pursuant to Rule 36.1 of the Supreme Court Rules, counsel for amici requested and received written consent to the filing of this brief from counsel for all parties. The consent letters are submitted with this brief.

projects filed suit in the United States District Court for the District of Columbia to compel HUD to pay operating subsidies as mandated by the statute.

The Battles Farm suit was argued before the district court together with Underwood, and the district court decided both cases on the same day in similar opinions. See Battles Farm Co. v. Hills, 414 F. Supp. 521 (D.D.C. 1976), aff'd in part and rev'd in part, 703 F.2d 1292 (D.C. Cir. 1983); Underwood v. Hills. 414 F. Supp. 526 (D.D.C. 1976). In both cases, the district court granted permanent injunctive relief on behalf of the plaintiffs.

The central issue in both Battles Farm and Underwood was resolved when the government capitulated. In Underwood, the government "settled" the case on terms more favorable than a consent judgment;[2] in

2. See Dubose v. Harris, 82 F.R.D. 582, 588 (D. Conn. 1979).

Battles Farm, the government abandoned its argument that the subsidy program was not mandatory, even though that argument would have been a defense to certain relief issues still before the court of appeals.

In Battles Farm, as in Underwood and a third related case, Dubose v. Pierce, the district court awarded the plaintiffs fees under the EAJA.[3] On appeal, however, the courts reached widely divergent results. Applying an "abuse of discretion" standard of review, the court below affirmed, while the Second Circuit in Dubose, following a "de novo" standard, reversed, holding that the government's position had been substantially justified. Dubose v. Pierce, 761 F.2d 913 (2d Cir.

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3. The Underwood case was transferred to the Central District of California for administration of the settlement agreement, and that court entered the award of fees.

1985), petition for cert. pending, No. 85-516, rev'g 579 F. Supp. 937 (D. Conn. 1984).

In Battles Farm, the D.C. Circuit also reversed. The court did not decide whether HUD's position had been substantially justified. Rather, using the de novo standard of review and relying on an argument never advanced by HUD in the district court or on appeal, the court ruled that HUD was immune from a fee award because it had prevailed on a separate but related issue in the litigation. Battles Farm Co. v. Pierce, 806 F.2d 1098 (D.C. Cir. 1986), petition for cert. pending, No. 86-1661. The present case is of obvious importance to the Battles Farm projects because of its likely impact on the projects' ultimate recovery of fees.

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Court should explicitly address the proper standard for reviewing district court findings on "substantial justification" determinations -- an issue subsumed within the first question presented and, in any event, necessarily before the Court in reviewing the court of appeals decision. See generally Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 n.12 (1981).

The projects urge the Court to affirm the approach followed by the court below, which applied the abuse of discretion rather than the de novo standard of review followed by other circuits. De novo review promotes wasteful and socially unproductive fee litigation and deters the prosecution of meritorious fee applications, particularly under the EAJA, which does not provide full compensation for time spent in litigating fee issues. The abuse

of discretion test, on the other hand, strikes a sound balance between expediting disposition of fee applications and assuring consistent results under the EAJA.

II. In addition, the Court should underscore a point seemingly conceded, but then ignored, by the Solicitor General -- namely, that the critical issue in applying the "substantial justification" test generally is the law extant at the time of the commencement of the suit. The purpose of the statute is to encourage small business concerns and individuals to challenge unjustified government action by subsidizing the private party's cost of doing so. That purpose would be undermined by a rule allowing favorable interlocutory rulings obtained by the government after the commencement of suit to defeat the justified expectation of a fee award of the private litigant who ultimately prevails.

I. THE ABUSE OF DISCRETION STANDARD APPLIES TO REVIEW OF THE "SUBSTANTIAL JUSTIFICATION" ISSUE.

The court below held that the district court did not abuse its discretion in determining that the government's position on the merits had not been substantially justified. Underwood v. Pierce, 761 F.2d 1342, 1346 (9th Cir. 1985). Other courts, by contrast, have applied a de novo standard of review to "substantial justification" determinations. See, e.g., Dubose v. Pierce, supra, 761 F.2d at 917; Spencer v. NLRB, 712 F.2d 539, 563-64 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). The abuse of discretion standard is the correct test, since it is more likely to encourage the assertion of meritorious claims against the government and to simplify fee proceedings.

The Solicitor General acknowledges that "[d]uplicative litigation over

attorneys' fees is more than simply wasteful; it also threatens to defeat EAJA's purposes." Brief for the Petitioner at 21. Yet the de novo standard encourages a second, lengthy, socially unproductive litigation by effectively requiring prevailing parties to win twice -- once before the district judge who heard the case on the merits and then again before a circuit panel.

Moreover, the de novo standard particularly deters the prosecution of EAJA applications by forcing small business concerns and individual litigants to run a gauntlet of review that they cannot afford because of limitations on the recovery of fees. The EAJA generally limits hourly fees to $75, see 28 U.S.C. § 2412(d)(2)(A), a rate far below the customary rates in most parts of the country. Furthermore, the government maintains that the EAJA does not compensate litigants at all for time

spent in opposing reasonable positions by the government on fee issues.[4]

The operating subsidy cases illustrate the dangers and uncertainties of de novo review. The court of appeals in Underwood, applying the abuse of discretion standard, affirmed the fee award, while the courts of appeals in Dubose and Battles Farm, applying the de novo standard, reversed. Indeed, in Battles Farm the court of appeals not only scrutinized the district court fee award through the prism of de novo review, but also seized on a theory never before advanced by the government to overrule the trial judge. Such decisions surely must give pause to a private party considering a challenge to unjustified government action in reliance on the EAJA.

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4. See, e.g., Cornella v. Schweiker, 741 F.2d 170 (8th Cir. 1984). But see, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 809-10 (D.C. Cir. 1984).

The "substantial justification" question, of course, is neither a pure issue of law, subject to de novo review, nor a pure issue of fact, which may be overturned only if clearly erroneous. The determination is more comparable to rulings such as the grant or denial of injunctive relief or leave to amend a pleading, which involve application of settled guidelines to various fact patterns and are subject to review under the intermediate "abuse of discretion" standard.[5] That standard is equally appropriate for EAJA rulings, since

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5. See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10-11 (1980) (Rule 54(b) certification reviewed under abuse of discretion standard); Foman v. Davis, 371 U.S. 178, 182 (1962) (district court grant or denial of leave to amend reviewed under abuse of discretion standard); Alabama v. United States, 279 U.S. 229, 231 (1929) (trial court's determination whether to grant preliminary relief may be reversed only when the judge's "discretion was improvidently exercised").

the application of the proper legal standard to a particular set of facts under the EAJA generally will not have significant precedential value, and since issues relating to the legal standard itself in any event will remain subject to plenary review.

The courts that follow the de novo standard apparently do so to promote consistency of results under the EAJA. See Spencer v. NLRB, supra, 712 F.2d at 563-64. There is no reason to believe that the de novo standard serves that purpose any better than the abuse of discretion standard. In any event, there is a greater need for quick and final disposition of fee requests than for more uniformity in results. The issue under review, after all, is not whether the government erred in its position, a matter already properly settled by the litigation on the merits. The issue instead is how badly it erred -- a question

that the district judge may be in a better position than the court of appeals to assess and that does not merit a second, extended litigation. The "abuse of discretion" standard provides ample protection against court error.

II. IN ASSESSING EAJA PETITIONS, THE COURTS SHOULD LOOK PARTICULARLY TO THE LAW EXTANT AS OF THE COMMENCEMENT OF THE LITIGATION.

The Solicitor General argues that the government should be per se immune from fees under the EAJA based on favorable, interlocutory rulings occuring after suit is commenced, even if the private party prevails on the merits. That test would deter the assertion of meritorious claims and defenses against the government and seriously undermine the statutory objective of awarding fees.

Congress enacted the EAJA because of concern that high litigation costs deterred small businesses and individuals

from contesting unjustified governmental actions.

> "For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980); see also S. Rep. No. 253, 96th Cong. 1st Sess. 5 (1979).

The statute, in short, was intended to "reduce the deterrents" to asserting meritorious claims or defenses against the government. H.R. Rep. No. 1418, supra, at 5-6; S. Rep. No. 253, supra, at 1.

It follows that the most important factor in determining the "substantial justification" issue generally must be the law extant at the time of the commencement of the suit, not as it develops over the course of the litigation. As the D.C. Circuit has noted:

> "The disincentive to challenge unreasonable governmental action caused by fear of incurring large litigation expenses will be significantly reduced only if potential litigants are able to predict reasonably accurately whether they ultimately will be able to recover their attorneys' fees." Spencer v. NLRB, supra, 712 F.2d at 563.

Moreover, the Solicitor General himself appears to concede the need for predictability at the outset of the litigation when he correctly observes:

> "The prospect of lengthy and unpredictable litigation about the availability of fees may make it impossible for persons interested in contesting government action to gauge the likelihood of a fee recovery. That uncertainty, and the expense associated with resolving it, may discourage challenges to unjustified government action." Brief for the Petitioner at 21-22.

Accordingly, several courts, including the court of appeals in this case, have properly reasoned that the government is not substantially justified in advancing a position that previously has been rejected,

despite the government's contention that the earlier decisions were in error.[6]

Spencer v. NLRB contains the most thorough analysis of this issue. There, the D.C. Circuit established the principle that the government's position is not substantially justified if it is contrary

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6. See, e.g., Underwood v. Pierce, supra, 761 F.2d at 1346; Spencer v. NLRB, supra, 712 F.2d at 558-59; Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983) ("The more often an issue is decided against the government the more unreasonable advancing such a claim again will be."). See also Trahan v. Regan, 824 F.2d 96, 102 (D.C. Cir. 1987) ("[O]nly in unusual circumstances can a court find that agency action based on the agency's interpretation of its own regulations or governing statute is 'substantially justified' if the court has previously overruled that interpretation and found the agency action to be contrary to law."); H.R. Rep. No. 1418, supra, at 11, and S. Rep. No. 253, supra, at 6-7 (courts should carefully consider fee awards where the government has continued to litigate after prior suits on the same claim have been decided against it or the government's position has been disposed of summarily).

to the authority prevailing at the commencement of the case. "[T]he more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less 'justified' it is for the government to pursue or persist in litigation." 712 F.2d at 559. This is so even if the government argues that the authority is wrong, because, while "[t]he government is always free . . . to seek modification or repudiation of established doctrines, . . . individual private litigants should not be compelled to subsidize" those efforts, if unsuccessful. Id.

> "In sum, a court assessing an EAJA petition should attend to the strength of the government's argument(s) that extant law permits a result in its favor, not to the strength (or probability of success) of its arguments(s) that the law should be changed." Id. (emphasis in original).

The rule urged by the Solicitor General, of course, flies in the face of

this principle by allowing developments after the commencement of suit to defeat the private litigant's justified expectation of a fee award. Indeed, the Solicitor General's position would encourage the government to pursue or prolong unreasonable litigation, since by doing so it would increase the chance of obtaining favorable action at some stage of the same or a related proceeding, and thus frustrate a fee award. This incentive would be aggravated if, as the government contends, it may rely even on favorable interlocutory action (such as a stay pending appeal) or on the vote of a single dissenting judge. Such a ruling would overrule lower court decisions holding that the government may be ordered to pay fees under the EAJA even if it prevailed in the lower court. See, e.g., Martin v. Lauer, 740 F.2d 36, 43 (D.C. Cir. 1984) (rejecting as "patently absurd" the government's argument "that the

substantial justification for [its] position [was] conclusively evidenced by the fact that [it] prevailed before the District Court" after a full hearing on the merits).

Under a proper application of the EAJA, the decision below must be affirmed. The Solicitor General asserts that the government should not be found liable for fees if it can show "that an informed judgment would have viewed its arguments as having some substance and a fair possibility of success." Brief for the Petitioner at 16. Even assuming that this is a correct statement of the government's burden under the EAJA (actually, the agency's position must be "more than reasonable," see Spencer v. NLRB, supra, 712 F.2d at 558), we submit that the government must lose. HUD could not reasonably have believed that its arguments had substance or "a fair possibility of success" after they had been

unanimously rejected on the merits by the nine separate courts to consider them. See Battles Farm Co. v. Hills, supra, 414 F. Supp. at 526; Underwood v. Hills, supra, 414 F. Supp. at 531. It would emasculate the statute to hold that a party who commences suit in reliance on such a strong and consistent body of authority and who prevails on the merits may not recover fees because of favorable interlocutory rulings obtained by the government following final judgment in the district court.

HUD acknowledges that "[t]he district court decisions cited by the court below, of course, would be entitled to some weight if they stood alone," but asserts that here "the judicial authority points in both directions." Brief for the Petitioner at 27 n.13. When the respondents filed suit, however, the authority all pointed in their favor. Moreover, the subsequent developments did not change the law. Every

court to consider the issue on the merits rejected HUD's position, and HUD ultimately abandoned its position both in Underwood and Battles Farm . See pp. 3-4, supra.

It would be particularly inappropriate to preclude a fee award based on the stay and grants of certiorari on which HUD relies in this case. This Court understandably has discouraged lower courts from speculating as to the Court's motive or rationale for entering unexplained orders. The grant of a stay, in particular, involves a careful weighing of equities and may or may not reflect an assessment of likelihood of success on the merits. In this regard, it is significant that HUD approached this Court for a stay only after the Underwood judgment would have required HUD to disburse the entire proceeds of the rental reserve fund used to pay operating subsidies, in effect threatening to moot HUD's appellate rights. As HUD emphasized in its stay application:

> "Approximately $66.2 million would be required to make operating subsidy payments from February 18, 1975 through August 1976 as directed by the District Court . . . . Even if all unobligated contract authority were spent on the operating subsidy program . . . . and the reserve fund were utilized as a separate source of funds independent of the contract authority, a single retroactive payment to members of the plaintiff class would sustantially exhaust all possible sources of subsidy payments, leaving no way to continue the program."[7]

Similarly, the grant of certiorari implies no view on the merits, since it is vested entirely within the Court's discretion and "can be invoked or withheld for any reason

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7. Application for a Stay of the Judgment of the District Court Pending Appeal to the United States Court of Appeals for the District of Columbia Circuit, Hills v. Underwood, No. A-259, at 12 (O.T. 1976) (emphasis added). See also, e.g., id. at 15 ("the disruption occasioned by compliance with the district court's order will serve only to initiate a program that will have no continuing life"). HUD also argued in its stay application that there would be over $10 million in administrative costs to implement the program nationwide.

that the Court sees fit." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 195 (6th ed. 1986).

Furthermore, this Court's actions did not, as the government now suggests, vindicate the reasonableness of the agency's legal position. Even if the stay in Underwood implicitly incorporated a finding of likelihood of success on the merits -- and the stay was silent on the matter -- that finding would be entitled to limited weight because it was an unexplained, preliminary finding based on a truncated record. The Underwood stay application summarized the case and presented the agency's argument in 15 pages. Thus, unlike the lower courts that had unanimously rejected the agency's position, this Court

did not have the benefits of full argumentation.[8]

CONCLUSION

The judgment below should be affirmed, with guidance provided to the lower courts on the proper standard of review and the importance of the law extant as of the commencement of suit.

Respectfully submitted.

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October 1987

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8. See Dubose v. Pierce, 579 F. Supp. 937, 950 (D. Conn. 1984), rev'd, 761 F.2d 913 (2d Cir. 1985) petition for cert. pending, No. 85-516, where the court noted that HUD's position "had some initial appeal" but, on further review, "was not merely unreasonable but had no justifiable basis."

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1512

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL R. PIERCE, JR., Secretary of Housing and Urban Development,

Petitioner

v.

MYRNA UNDERWOOD, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE NOSSCR

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a non-profit corporation. Our members regularly represent people claiming disability benefits from the Social Security Administration (SSA) of the U.S. Department of Health and Human Services (DHHS). Most of our members are attorneys in private practice, but others work in programs which provide legal services to the poor.

NOSSCR members often file civil actions in the U.S. district courts after SSA denies or terminates disability benefits to their clients. The district courts have reversed SSA's decisions thousands of times in each of the past few years, even though the courts use a deferential standard of review of the administrative record.

Social Security claimants who have won relief in court are the group mainly affected today by the Equal Access to Justice Act, 28 U.S.C. §2412 (1982 & Supp. III 1985) ("EAJA"). In the two most recent statistical years, statistical year 1986 and statistical year 1987, 85%-90% of all EAJA applications filed and granted in federal courts came from Social Security disability reversals. About 60% of the total dollars awarded under EAJA in statistical year 1986 were in these disability cases, dropping to about 20% in statistical year 1987 due to a few large awards in other types of cases.[1] In the 1987 statistical year, 391 EAJA applications were filed in district court against DHHS, compared with only three

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1. See Report of the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, September 18, 1986 *reprinted in* Annual Report of the Director of the Administrative Office of the United States Courts 1986 at 91-95. See also Report by the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses under the Equal Access to Justice Act of 1980 — July 1, 1986 through June 30, 1987, appended hereto.

such applications against petitioner, the Secretary of Housing and Urban Development. Appendix at A-7.

Dollars awarded under EAJA typically reimburse the disabled client for attorney fees which would otherwise have to be paid out of the client's past-due benefits. *See* §206(b) of the Social Security Act, 42 U.S.C. §406(b) (1982); 28 U.S.C. §2412 note. Infrequently the EAJA award directly benefits the attorney, where the amount of past due benefits is inordinately small. Thus NOSSCR's primary interest in this case is on behalf of the disabled clients of our members, who are often forced to go to court to fight unjustified decisions by SSA.

NOSSCR wishes to inform the Court of how the typical EAJA claim differs from the *Underwood* claim and discuss the arguments of the parties in that light, so that the Court's decision will not have unintended effects on the EAJA claims of Social Security claimants who have vindicated their rights in court.

The fee approved by the Ninth Circuit in *Underwood*, $322,700, reflects the unusual nature of the case, its size, length and complexity. By contrast, the typical EAJA fee, that awarded to the prevailing disability claimant, is quite small. In the 1987 statistical year, the district courts granted EAJA fees and expenses against DHHS in 343 cases, awarding a total of $733,126. Appendix at A-7. Hence the average award in the most common EAJA case was only $2,225. The size of the EAJA award bears no relationship to the amount in controversy in the underlying disability litigation. A middle-aged disabled worker becomes eligible to receive cash payments easily exceeding $100,000 plus other benefits, barring improvement.

Whereas *Underwood* involves an original action filed in federal court, the typical EAJA claim involves review of an administrative record. Social Security disability cases are fact-intensive and typically the court has already used a deferential substantial evidence test in reversing SSA's findings of fact. Section 205(g) of the

Social Security Act, 42 U.S.C. §405(g) (1982). The issue in *Underwood*, by contrast, was a pure question of law, and the district court applied no deferential standard of review.

Finally, attorney fees under the housing statute in *Underwood* are unregulated. By contrast, the award of attorney fees in Social Security appeals is otherwise completely regulated by Section 206(b) of the Social Security Act, 42 U.S.C. §406(b) (1982). Hence award of an EAJA fee in a Social Security appeal involves the interplay of two statutory attorney fee provisions, a factor not present in this case.

SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") was intended by Congress to provide individuals with meaningful access to justice to enable them to challenge weakly-grounded governmental action. One major group properly benefiting from this remedial legislation is people who have been wrongly denied disability benefits by the Social Security Administration (SSA). Where such an individual prevails in court after lengthy administrative proceedings because the court determines that there was no substantial evidence supporting the denial of benefits, attorney fees are often properly awarded under EAJA. EAJA mandates that a court shall award fees to a prevailing party except where the government's position was substantially justified. The Court should not construe this exception in such an expansive way as to swallow up the general fee shifting provisions.

EAJA has been selectively used by the Social Security plaintiffs' bar and has not been applied in an automatic or inappropriate fashion by the lower courts. It enables many disabled people to contest overreaching agency action in court without undue personal cost.

The lower courts have properly used such objective indicia of lack of substantial justification as reversal on a substantial evidence test. Similarly in the instant case, there are compelling objective indicia of the government's lack of substantial justification: multiple consistent prior losses on the same issue and final complete capitulation to plaintiffs' position.

The Court should construe "special factors" in such a way as to allow the lower courts flexibility to effectuate Congress' purposes in enacting EAJA. The complexity of this arcane lawsuit and limited availability of counsel undoubtedly were special factors. The findings by the lower courts of these special factors were not clearly erroneous, and there is no basis to overturn them.

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY AWARDED FEES TO THE PREVAILING PLAINTIFFS, INTERPRETING "SUBSTANTIALLY JUSTIFIED" TO FULFILL THE PURPOSES OF EAJA

A. *The Ninth Circuit's Construction of "Substantially Justified" Was Consistent With the Act.*

Under the Equal Access to Justice Act, a court *shall* award attorney fees and other expenses to a "prevailing party" in litigation against the government unless "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A) (1982 and Supp. III 1985). The Ninth Circuit was in line with the language, structure, purpose and legislative history of EAJA, and with other court decisions applying EAJA, in upholding a fee award in this case. This case does not present the question of whether "reasonableness" may be substituted for the statutory test, but if that question is reached, this Court should not endorse any

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substitute language for "substantially justified" which would narrow or dilute EAJA.

Denying fees in *Underwood* by restructuring current judicial interpretation of EAJA could have a profound, negative impact on persons who are wrongfully denied disability benefits by the Social Security Administration, as well as on potential litigants who wish to challenge other weakly-grounded agency action in court. It must be emphasized that EAJA, *by definition*, can only apply in the event of *wrongful* denial of these statutorily enacted benefits; if the denial is ultimately upheld, EAJA will almost never apply as the individual will not be a "prevailing party".

Congress intended EAJA to provide real access to the courts for those harmed by unsupportable government action. To effectuate Congress' purpose in twice adopting EAJA, it is important that the Court not allow the exception to swallow up the general mandate that the courts "shall award" attorney fees and costs to a prevailing party against the United States. This Court has said in the context of an exemption to such remedial legislation:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

Phillips Co. v. Walling, 324 U.S. 490, 493 (1945).

B. *The Ninth Circuit's Ruling Is Consistent With The Act And With Its Application To Social Security Cases.*

Individuals who are denied — or terminated from — disability benefits have already undergone a lengthy set

of administrative proceedings before they appeal their case to federal court. Over the course of months or years, their claims have been rejected after initial determination, reconsideration, an administrative law judge hearing and Appeals Council review. Delays in the system are notorious.[2]

It is only after claimants have exhausted the remedies in this four-tier administrative process that they have the opportunity to seek judicial review. Section 205(g) of the Social Security Act, 42 U.S.C. §405(g). *Bowen v. City of New York*, 476 U.S. ____, 106 S.Ct. 2022, 2026, 90 L.Ed.2d 462, 470 (1986). The nature of this judicial review is not *de novo;* rather it is a deferential review of the administrative record on a substantial evidence basis, per Section 205(g). This Court has defined the substantial evidence test for Social Security appeals thus:

> [T]he statutory standard of "substantial evidence" prescribed by Section 205(g) [means] "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Richardson v. Perales, 402 U.S. 389, 401 (1971). The Secretary's findings of fact are "conclusive" against the claimant if supported by substantial evidence.

Disabled claimants seeking review in district court of final decisions denying benefits are faced with certain impediments to obtaining counsel. Many claimants are not able to obtain free representation provided by legal aid or legal services organizations because they are

2. In 1984, this Court declined to sanction judicially imposed time limits on these processes, but there was no question of the well-known existence of *unreasonable* delays in adjudicating benefits. *Heckler v. Day*, 467 U.S. 104 (1984). The Court noted that, "[T]he legislative history makes clear that Congress [is] fully aware of the serious delays in resolution of disability claims. . . ." *Id.* at 110-111.

financially ineligible, because there is no such organization serving their area, or because the existing organization is so overburdened that it cannot take their case. These individuals must find competent private counsel who are willing to take their cases based on a possible contingent fee.

Section 206(b) of the Social Security Act, 42 U.S.C. §406(b), regulates attorney fees in the typical claim for Social Security disability benefits. It provides that the attorney fee for court work is subject to approval by the court and can never exceed 25% of the past due benefits. Hence attorneys cannot have the court approve a fee unless they succeed with their client's claim and then the fee is limited. Due to a variety of circumstances, the very fee controls designed to protect claimants from excessive fees will sometimes produce potential fee awards so small that attorneys will find it impossible to undertake the case.[3] This can occur even where the potential benefit to the claimant is quite significant. Moreover this fee structure in the Social Security Act contains no provision for fee shifting, hence the client is always responsible for whatever fee is approved no matter how outrageous the actions of SSA in denying the claim.

In the arena of disability appeals, EAJA has properly operated to remediate these problems in many cases. It has enabled claimants who have been denied benefits without substantial justification to obtain attorneys even where the amount of the potential back award would be too small for attorneys otherwise to afford to take the case. Where the EAJA fee has gone to legal services programs, they are better able to represent indigent

3. See e.g., *Cloyd v. Weinberger*, 527 F.2d 1167 (6th Cir. 1976) where the court applied a Worker's Compensation offset to reduce the attorneys fee for a successful district court case from $1,028.60 to $186.55.

people with these types of claims, since EAJA awards benefit the programs.

More frequently, EAJA protects claimants whose benefits were denied without substantial justification from having to spend part of their past due benefits on an attorney, by shifting the fee burden to the government. There is no double recovery for attorney or client. EAJA specifically provides that where attorneys obtain fees under both EAJA and §206(b) of the Social Security Act, they must refund the smaller fee to the client. 1985 Amendments to EAJA, §3, P.L. 99-80, 99 Stat. 186, 28 U.S.C. §2412 note. By shifting the fee, EAJA properly works to discourage SSA from denying claims with no substantial justification.

Congress apparently understood that Social Security cases in court would be an important group of cases under EAJA, and after lengthy discussion decided not to exclude them. H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 12 (1980), *reprinted in* 1980 U.S. Code Cong. and Ad. News 4984, 4991 ("1980 House Report").

Although the district courts reverse the Secretary of DHHS in thousands of disability cases annually, only 391 EAJA claims were filed against DHHS in district court in statistical year 1987. Appendix at A-7. It thus appears clear that EAJA is hardly being overutilized or applied excessively in Social Security cases. Indeed total EAJA fees in all court cases against all agencies were only $3,844,431 in statistical year 1987, far less than the $35+ million estimate by the House Judiciary Committee report that accompanied the 1985 legislation. Appendix at A-2; H.R. Rep. No. 99-120, 99th Cong. 1st Sess., *reprinted in* 1985 U.S. Code Cong. and Ad. News 132, 152 ("1985 House Report").

In statistical year 1987, 87.7% of the EAJA applications in district court in Social Security appeals were granted. Appendix at A-7. This high rate mirrors Congress' consensus that the substantial evidence standard and the substantial justification test are closely related,

but not identical. In other words, reversal on a substantive evidence test is a strong objective indicator of lack of substantial justification.

Congress has noted the similarity between the "substantially justified" test in EAJA and the "substantial evidence" standard of review used on the merits in disability cases. In both 1984 and 1985, the House Judiciary Committee stated that it is "virtually certain" that a decision of an agency was not substantially justified if the decision was reversed by the court because it was not supported by substantial evidence. H.R. Rep. No. 98-992, 98th Cong., 2d Sess. 7 (1984) ("1984 House Report"); 1985 House Report at 9-10 *reprinted* in 1985 U.S. Code Cong. and Ad. News 132, 138. Floor remarks in 1985 questioned whether "virtually certain" sounded too close to an automatic award. The consensus was that although an award could not be automatic even in these cases, the two standards are similar. Even Rep. Kindness, who led the objection to the "virtually certain" formulation, agreed that there is a "close relationship" between the two standards. 131 Cong. Rec. H4763 (daily ed. June 24, 1985); *cf. id.* at H4760-64, 131 Cong. Rec. S9991-98 (daily ed. July 24, 1985).

C. *The Ninth Circuit Correctly Utilized "Objective Indicia" In Awarding EAJA Fees.*

In this case, the government argues that "objective indicia" should be used by a court in deciding whether the government's position was substantially justified, in order to avoid "a second round of litigation that rehashes the merits in an attempt to grade the strength of the government's losing argument." Brief for Petitioner at 20-21. HUD mentions only those "objective indicia" which would help the government. However, the concept cuts both ways.

NOSSCR agrees that such indicia are useful and approved by Congress. 1980 House Report at 11 (judgment on the pleadings, directed verdict, prior suit dismissal); 1985 House Report at 9-10 (prior findings of arbitrary and capricious, or no substantial evidence). The typical EAJA claim, in a disability case, has at least one such powerful indicator — a prior reversal on the merits under a substantial evidence standard. Since the typical EAJA claim is less than $3,000, "rehashing the merits" would not be an effective use of judicial energy. Ironically, in NOSSCR's experience, SSA often opposes EAJA applications by trying to "rehash the merits."

In this case the Ninth Circuit properly used indicia, rather than re-examining the operating-subsidiary legislation itself, in affirming the EAJA award. The indicia favoring an EAJA award were unusually strong: numerous district courts had unanimously held that HUD was wrong on the merits in operating-subsidy cases including this one. HUD had agreed to a "cav[illegible]in" settlement even after this Court acted. Perhaps more than anything else, this complete capitulation in settlement silently expresses the government's own true assessment of the strength of its position. The Ninth Circuit correctly gave less weight to HUD's indicia than to Underwood's, because grants of stays and certiorari did not have sufficient predictive value about this Court's view of the merits. An EAJA application must be decidable by the district court with information then available.

II. "SPECIAL FACTORS" WERE PROPERLY INTERPRETED BY THE NINTH CIRCUIT TO FULFILL THE PURPOSES OF EAJA

HUD apparently concedes that the EAJA fees awarded were "reasonable attorney fees" and were "based upon prevailing market rates for the kind and quality of the services furnished" under 28 U.S.C.

§2412(d)(2)(A) (Supp. III 1985). HUD argues that the fee award should have been limited to $75 per hour.

The statute allows a court to award a fee in excess of $75 per hour if it determines that "an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The purpose of the $75 figure, as adjusted for inflation, was to control the government's costs under the statute. Congress gave the courts discretion to exceed the hourly rate limit in individual cases, where mechanical application of the limit would defeat the purposes of the Act. The one example of a special factor which Congress gave, "limited availability of qualified attorneys for the proceedings involved," shows Congress' recognition that $75 per hour, even as adjusted for inflation, would not be enough in some cases. If there is "limited availability" of attorneys, the aggrieved individual or small business may be forced to spend more than $75-plus-inflation per hour, no matter how carefully he or she shops for a lawyer. Where access to justice would be threatened by use of the hourly rate limit, Congress authorized higher fees.

Although Respondent Underwood did not ask for a cost-of-living increase in the $75 figure, because EAJA had become effective only a short while before the application in this case, there has been a large increase in the cost of living during this EAJA litigation. $75 has increased since 1981 to $88 or $102 depending on whether the "all items" or "other services" indices of the Consumer Price Index for all urban consumers is used. Monthly Labor Review (U.S. Department of Labor) January 1982, May 1987. These increases in the cost of living since the EAJA application was filed would allow the $75 figure to be increased substantially before consideration of any special factors. The highest rate allowed by the Ninth Circuit ($120) is only a modest increase over $75, considering inflation as Congress intended.

The typical EAJA Social Security claim today is eligible for a raised hourly rate because of increases in the cost of living, assuming that the prevailing rates for the legal services exceed $75. Beyond that, few special factors have been allowed in typical Social Security EAJA claims. *See, e.g., Chipman v. Secretary of Health and Human Services*, 781 F.2d 545 (6th Cir. 1986); *Bunn v. Bowen*, 637 F. Supp. 464 (E.D. N.C. 1986). However, in more complex class actions where limited availability of qualified attorneys is shown, courts have found the special factors. *See e.g., Hyatt v. Heckler*, 807 F.2d 376 (4th Cir. 1986).

Underwood is undoubtedly a complex case in an arcane area of law and procedure. All of the factors used by the district court and approved by the Ninth Circuit are appropriate. Particularly since "limited availability" was shown, the court was correct in considering the novelty and difficulty of the issues, the contingent nature of the (EAJA) fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained. All of these factors realistically affect the availability of counsel for the aggrieved person, and hence the equal access to justice.

The typical Social Security EAJA claim presents contingency of the fee as the only likely "special factor" to raise the $75 figure beyond inflation. There are areas of the country where even a $100-per-hour contingent fee, likely to be delayed several years, is not enough to attract a qualified attorney to fight a bad SSA decision in court. In less typical Social Security cases, a sub-specialist may be necessary, which could be a "special factor." In some types of cases, as in *Underwood*, the fee must be contingent on EAJA fees being granted, rather than merely contingent on the merits being won, which creates a double contingency which HUD ignores in this case. Brief of Petitioner at 36 n. 16.

Congress left "special factors" open-ended so that district courts could prevent the $75-plus-inflation limit

from defeating the purposes of the Act in an individual case. Respondent Underwood supplied uncontroverted proof in this case that there was a limited availability of attorneys to handle the matter. That factor alone sets *Underwood* apart from the typical case and requires that the award be affirmed. As with most special factors, such a determination generally falls within the fact-finding function of the trial court and should not be disturbed unless clearly erroneous.

CONCLUSION

In upholding the ruling below in this case, the Court should decline HUD's request to cripple the Equal Access to Justice Act through a restrictive gloss. Congress intended for litigants like Underwood to have equal access to justice. It is fully appropriate to uphold the Ninth Circuit and not vitiate the promise that Congress has held out to individuals, such as those that NOSSCR members represent, of having a real opportunity to challenge tenuous government action.

Respectfully submitted,

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Dated: October 7, 1987

APPENDIX

REPORT BY THE DIRECTOR

OF THE

ADMINISTRATIVE OFFICE

OF THE

UNITED STATES COURTS

ON REQUESTS FOR FEES AND

EXPENSES UNDER THE

EQUAL ACCESS TO JUSTICE ACT OF 1980

JULY 1, 1986 THROUGH JUNE 30, 1987

L. Ralph Mecham
Director

September 24, 1987

REPORT OF FEES AND EXPENSES AWARDED UNDER THE EQUAL ACCESS TO JUSTICE ACT

THE EQUAL ACCESS TO JUSTICE ACT

The Equal Access to Justice Act, reauthorized by Public Law 99-80, 99 Stat. 183, lessens the financial burden on private parties who prevail against the U.S. in agency adversary adjudications or non-tort civil actions, by authorizing the award of attorney fees and expert witness fees. The Act also covers outlays for any study, analysis, engineering report, test, or project necessary in building a case. To be eligible for such an award, the party must prevail and meet certain financial requirements of the statute. Even when the private party prevails against the U.S. and is determined to be financially eligible, the attorney fees and other expenses requested can be denied if the U.S. can demonstrate that its position was "substantially justified." Applications for fees may also be denied if the court finds that the private litigant used delaying tactics or if special circumstances exist which would make an award unjust. This is the sixth report submitted by the Director in accordance with Title 28, U.S.C. Section 2412(d)(5).

AMENDMENTS TO PREVIOUS REPORTS

The 1982 report included one case where the court awarded $435,999 in attorney fees and other expenses against the Department of Health and Human Services and three other agencies. This case was appealed and subsequently remanded to the district court several times. Finally, in Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d. 217 (Ninth Circuit 1987), the appeals court reduced the award to $138,551 and awarded it under provisions of The Rehabilitation Act of 1973 (Title 29

U.S.C. Section 794a(b)) *not* the Equal Access to Justice Act. Table 28 provides revised totals for 1982.

Table 1
Decisions on Equal Access to Justice Act Applications
1982 Through 1987

Year	Total Applications	Applications Denied	Applications Granted	Total Awarded
1982[1]	33	23	10	$264,339
1983	141	93	48	$778,502
1984	296	130	166	$1,417,211
1985	377	157	420	$1,912,768
1986	672	108	564	$2,567,910
1987	482	95	387	$3,844,431
Percent Change 1987/1986	-28.3	-12.0	—31.4	49.7

[1]Effective October 1, 1981 through June 30, 1982.

After the 1986 report was published, data were received on 15 additional fee determinations made prior to June 30, 1986. These cases raised the total number of applications terminated during 1986 to 672. The Federal courts granted nearly 84 percent of the applications and awarded a total of $2,567,910 to the successful applicants.

ANALYSIS AND SUMMARY OF 1987 DATA

During 1987, Federal courts disposed of 482 applications for attorney fees and other expenses, 28 percent fewer than in 1986 (See Table 29). The substantial drop in equal access applications was largely attributable to a 30 percent drop in applications filed against the Department of Health and Human Services from 588 in 1986 to 412 in 1987. Most of these applications involved termination of disability benefits under the Social Security Act. The number of these cases filed in the U.S. district courts has dropped 59 percent since 1984. Since equal access determinations are made after a decision on the merits of the case, the decline in disability benefits

filings is not affecting the number of equal access applications for attorney fees. Despite the decline, the Department of Health and Human Services was the agency named in 85 percent of all equal access applications. Twenty-seven other agencies were involved in at least one equal access decision. As in prior years, the vast majority (416 applications or 86 percent) of equal access applications were decided in the U.S. district courts. Two districts, New Jersey (57 applications) and New York, Western (51 applications) accounted for 22 percent of all equal access dispositions. Another 54 (11 percent) applications were terminated in the U.S. Courts of Appeals. The U.S. Claims Court disposed of 10 applications and the U.S. Court of International Trade disposed of 2 applications.

More than 70 percent (338 applications) of the actions concluded this year were original applications under Title 28 U.S.C. Section 2412(d)(1)(A), after judgment in a civil case against the United States. Another 24 percent (114 applications) were original applications under Title 28 U.S.C. Section 2412(d)(3), after the court reviewed an administrative agency decision. Four equal access decisions were made after a petition for leave to appeal an administrative agency's fee determination had been filed pursuant to Title 5 U.S.C. Section 504(c)(2). The agency's denial of attorney fees was affirmed in three cases and reversed in one.

Twenty-six applications involved an appeal of a lower court decision. The appellate court affirmed the lower court in 18 cases and reversed in the other 8 cases. Cases remanded to the lower court for further proceedings are *not* included in this report.

Table 2
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
1987

Court/Agency	Applications	Applications Denied		Applications Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Total	482	95	$1,682,508	387	$4,804,428	$3,844,431	$3,718,888	—	$275	$125,268
U.S. Courts of Appeals										
Administrative Office of the U.S. Courts	1	1	13,410	—	—	—	—	—	—	—
Dept. of Agriculture	1	1	22,500	—	—	—	—	—	—	—
Dept. of the Air Force	1	1	13,590	—	—	—	—	—	—	—
Dept. of the Army	1	—	—	1	46,627	38,082	37,027	—	—	1,055
Dept. of Defense	1	1	—[2]	—	—	—	—	—	—	—
Dept. of Health and Human Services	21	13	68,708	8	152,204	72,141	69,440	—	—	2,701
Dept. of Housing and Urban Development	2	1	152,064	1	2,445	2,445	2,445	—	—	—
Dept. of Interior	1	1	—[2]	—	—	—	—	—	—	—
Dept. of Justice	3	2	22,380	1	19,993	19,993	19,993	—	—	—
Dept. of Labor	1	1	5,713	—	—	—	—	—	—	—
Dept. of the Navy	1	1	—[2]	—	—	—	—	—	—	—
Dept. of Transportation	3	—	—	3	67,506	51,373	49,013	—	—	2,360
Dept. of the Treasury	1	1	114,045	—	—	—	—	—	—	—

Table 2
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
1987 (Continued)

Court/Agency	Applications	Applications Denied		Applications Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Environmental Protection Agency	1	—	—	1	47,717	37,546	37,546	—	—	—
Federal Election Commission	1	1	12,000	—	—	—	—	—	—	—
Federal Emergency Management Authority	1	—	—	1	62,000	39,403	39,403	—	—	—
Immigration and Naturalization Service	1	1	—[2]	—	—	—	—	—	—	—
Internal Revenue Service	1	1	—[2]	—	—	—	—	—	—	—
Merit Systems Protection Board	2	—	—	2	4,450	4,450	4,450	—	—	—
National Labor Relations Board	5	4	66,070	1	5,249	5,249	5,249	—	—	—
Office of Personnel Management	2	1	3,400	1	13,781	13,781	13,781	—	—	—
United States Postal Service	2	1	2,602	1	194,162	5,000	5,000	—	—	—

Table 2
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
1987 (Continued)

Court/Agency	Applications	Applications Denied		Applications Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
U.S. Claims Court										
Commission on Federal Paperwork	1	1	30,185	—	—	—	—	—	—	—
Dept. of the Air Force	1	—	—	1	99,903	8,336	8,336	—	—	—
Dept. of Defense	2	—	—	2	144,454	24,301	20,471	—	—	3,830
Dept. of the Interior	2	1	45,296	1	306,842	20,235	20,235	—	—	—
Dept. of the Navy	1	1	35,931	—	—	—	—	—	—	—
Federal Aviation Administration	1	1	24,000	—	—	—	—	—	—	—
Internal Revenue Service	1	1	132,068	—	—	—	—	—	—	—
Office of Personnel Management	1	—	—	1	10,385	9,225	9,225	—	—	—
U.S. Court of International Trade										
Dept. of Commerce	1	1	—[2]	—	—	—	—	—	—	—
Dept. of the Treasury	1	—	—	1	23,068	22,487	22,487	—	—	—

Table 2
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
1987 (Continued)

Court/Agency	Applications	Applications Denied		Applications Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
U.S. District Courts										
Dept. of Agriculture	1	—	—	1	2,089	2,089	2,089	—	—	—
Dept. of the Air Force	1	—	—	1	1,660	1,660	1,630	—	—	30
Dept. of the Army	2	1	—[2]	1	48,573	42,957	42,147	—	—	810
Dept. of Defense	1	—	—	1	30,885	30,885	30,671	—	—	214
Dept. of Energy	2	—	—	2	100,000	100,000	100,000	—	—	—
Dept. of Health and Human Services	391	48	136,448	343	858,666	763,126	758,406	—	275	4,445
Dept. of Housing and Urban Development	3	1	18,000	2	43,904	43,904	42,940	—	—	964
Dept. of the Interior	2	2	689,146	—	—	—	—	—	—	—
Dept. of Justice	2	1	14,212	1	225,359	225,359	218,187	—	—	7,172
Dept. of the Navy	1	—	—	1	960,058	960,058	960,058	—	—	—
Dept. of Transportation	2	—	—	2	82,930	57,667	56,268	—	—	1,399
Federal Election Commission	1	1	51,920	—	—	—	—	—	—	—
Immigration and Naturalization Service	2	—	—	2	1,220,323	1,215,059	1,114,866	—	—	100,193

Table 2
Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency
1987 (Continued)

Court/Agency	Applications	Applications Denied		Applications Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Internal Revenue Service	3	2	8,802	1	8,887	8,887	8,802	—	—	85
Occupational Safety and Health Administration	1	—	—	1	824	824	824	—	—	—
Securities Exchange Commission	1	—	—	1	25,484	17,909	17,899	—	—	10

[1] A = Attorney Fees
B = Study, Analysis, Engineering Report, Test, or Project
C = Expert Witness Fees
D = Other, including photocopying costs, telephone expenses, and transportation costs.

[2] Petitioner did not specify an amount in the request for attorney fees.

Federal courts granted 387 (80 percent) requests for attorney fees and other expenses, awarding a total of $3,844,431. This is *not* the amount actually received by successful applicants, however, because many awards are appealed. As in prior years, the vast majority of the total amount awarded (97 percent) was for attorney fees. Another $125,268 was for other expenses such as travel and photocopying and $275 was awarded for expert witness fees.

Although the number of awards dropped 31 percent, the total amount awarded rose nearly 50 percent. This substantial increase in the amount awarded is due to two very large awards which together account for 56 percent of the total. In the first case, Louis v. Nelson, 646 F. Supp. 1300 (Southern District of Florida, 1986), the court awarded $1,206,791 against the Immigration and Naturalization Service (INS). The applicants successfully challenged an INS policy of accelerated exclusion proceedings and detention without parole of al Haitian refugees. In the second case, Edmonds v. U.S, 658 F. Supp. 1126 (South Carolina, 1987), the court awarded $960,058 in a class action suit against the Department of the Navy. The court held that the Navy had wrongfully withheld reenlistment bonuses from as many as 30,000 persons. The United States has appealed both of these awards.

Of the 95 denied applications, 61 percent (58 applications) were denied because the court found the United States position "substantially justified" as reasonable in law and in fact. Fifteen were denied because the application was not filed in a timely fashion; nine because the applicant was not the prevailing party; five because the court did not have jurisdiction to hear the request; four because the applicant should have filed under another fee-shifting statute; two because special circumstances made an award unjust; one because the applicant unduly protracted the proceedings; and one because the applicant withdrew the request.

In one of the two "special circumstances" cases, the court denied the application because the statute does not authorize attorney fee awards for pro se representations. In the other case, Taylor v. U.S., 815 F.2d 249 (Third Circuit 1987), a navy serviceman was convicted of manslaughter in Spain by the Spanish courts. While he was appealing his sentence, the serviceman's term of enlistment expired. The Navy extended the serviceman's enlistment even though he refused to extend it voluntarily. After the serviceman lost his appeal, he fled to the United States, was located by the Navy, and was going to be returned to Spain. He won a restraining order preventing him from being returned to Spain, however, because the Navy wrongfully renewed his enlistment. Nevertheless, the court denied his equal access application because the serviceman's conduct enabled him to avoid serving his validly-imposed criminal sentence. It would be unjust, therefore, to award attorney fees.